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CLERK U.S. DISTRICT COURT  
CENTRAL DIST. OF CALIF.  
LOS ANGELES

BY \_\_\_\_\_

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11 I-HEALTH, INC.

12 UNITED STATES DISTRICT COURT  
13 CENTRAL DISTRICT OF CALIFORNIA

14 WESTERN DIVISION

15 AMY JOVEL, on behalf of herself and all  
16 others similarly situated,

17 Plaintiff,

18 v.

19 I-HEALTH, INC., a Delaware  
20 Corporation,

21 Defendant.

Case No.

CV12-5526

DDP  
CJ(Gx)

NOTICE OF REMOVAL OF  
ACTION UNDER 28 U.S.C. §  
1441(a), 28 U.S.C. § 1446, AND  
THE CLASS ACTION  
FAIRNESS ACT

1 TO THE CLERK OF THE ABOVE ENTITLED COURT AND TO ALL  
2 PARTIES AND THEIR COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE that Defendant i-Health, Inc. ("i-Health") hereby  
4 removes this action from the Superior Court of the State of California for the  
5 County of Los Angeles to the United States District Court, Central District of  
6 California, Western Division.

7 In support thereof, i-Health states as follows:

8 1. This Court has removal jurisdiction pursuant to 28 U.S.C. § 1441(a)  
9 and the Class Action Fairness Act ("CAFA"), Pub. L. 109-2, 119 Stat. 4 (2005),  
10 codified at 28 U.S.C. §1332(d).

11 2. Plaintiff Amy Jovel filed a putative Class Action Complaint on March  
12 16, 2012. ("Complaint" or "Compl.") The Complaint included claims on behalf of  
13 plaintiff individually as well as a putative class of California consumers who  
14 purchased certain BrainStrong products developed and sold by i-Health. Compl.  
15 ¶29. i-Health was served with the Complaint on March 20, 2012.

16 3. Plaintiff filed a First Amended Complaint on April 16, 2012. ("FAC")  
17 As with the Complaint, the FAC asserted claims on behalf plaintiff individually as  
18 well as a putative class of California consumers who purchased certain BrainStrong  
19 products developed and sold by i-Health. FAC ¶29. i-Health was served with the  
20 FAC on April 17, 2012.

21 4. Plaintiff filed a Second Amended Complaint on May 30, 2012.  
22 ("SAC") In the SAC, plaintiff for the first time asserts claims on behalf of herself,  
23 as well as a "multi-state" putative class of "[a]ll consumers who purchased  
24 BrainStrong Toddler, BrainStrong Kids and/or BrainStrong Adults" products. SAC  
25 ¶29. i-Health was served with the SAC on May 30, 2012. It is on the basis of this  
26 expanded, nationwide putative class that i-Health had a basis to and hereby seeks to  
27 remove.  
28

Diversity Jurisdiction Under CAFA

5. Enacted to expand federal diversity jurisdiction over purported class actions, CAFA provides that a class action may be removed in accordance with 28 U.S.C. § 1446 if: (a) membership in the class is not less than 100; (b) any member of the plaintiff class is a citizen of a foreign country or a state different from any defendant; and (c) the aggregate amount in controversy exceeds \$5,000,000. *See* 28 U.S.C. §§ 1453(b) and 1332(d).

6. CAFA's first requirement – that class membership be no less than 100 (28 U.S.C. § 1332(d)(5)) – is satisfied. This putative nationwide class action is brought on behalf of “[a]ll consumers who purchased BrainStrong Toddler, BrainStrong Kids and/or BrainStrong adults.” SAC ¶ 29. In this regard, note that i-Health began marketing and selling the products at issue in the United States in March 2011. *See* Declaration of Wes Parris In Support of Notice of Removal (“Parris Decl.”) at ¶3. i-Health has a reasonable basis to conclude that there are far more than 100 members of the putative class, as from March 2011 through the end of May 2012, i-Health sold more than 340,000 units via retail sales of the BrainStrong products at issue in the United States. *Id.* at ¶¶4-5.

7. CAFA's second requirement – that any one member of the purported class is a citizen of a state different from any defendant (28 U.S.C. § 1332(d)(2)(A)) – is also satisfied. i-Health is not a citizen of California. Parris Decl. ¶2. And Plaintiff is a California citizen, SAC ¶ 10, and purports to represent a nationwide class of U.S. citizens. *Id.* ¶ 29.

8. CAFA's third requirement – that the aggregate amount in controversy exceeds \$5,000,000 exclusive of interest and costs (28 U.S.C. § 1332(d)(2)) – is satisfied as well. i-Health disputes the theories of liability and asserted remedies advanced in the SAC. Nevertheless, Plaintiffs seeks, among other things, restitution for the purchase price paid by the putative class of consumers. SAC ¶80 and prayer for relief. This amount, without more, puts more than \$5,000,000 in

1 controversy, as i-Health has more than \$6 million in retail sales in the United States  
2 of the products at issue. Parris Decl. ¶5.

3 9. In addition, plaintiffs also seek other damages, including punitive  
4 damages, injunctive relief and attorneys' fees, all of which will increase the amount  
5 in controversy. *See, e.g., Tompkins v. Basic Research LLC*, 2008 WL 1808316, \*4  
6 (E.D. Cal. April 22, 2008) (defendants' cost of compliance with an injunction is  
7 factored in to the amount in controversy).

8 Procedural Requirements Under Removal Statute

9 10. The procedural requirements set forth in 28 U.S.C. § 1446 are also  
10 satisfied here. Section (a) of that statute requires the removing party to file a notice  
11 of removal "in the district court of the United States for the district and division  
12 within which such action is pending," which i-Health does with this filing. Section  
13 (a) also requires a moving party to provide a copy to the district court of all process,  
14 pleadings, and orders served on defendants in the state action. The Complaint,  
15 FAC, SAC, summons, and other documents served on i-Health are attached hereto  
16 as Exhibit A.

17 11. i-Health was served with the SAC on May 30, 2012. *See* Summons,  
18 Ex. A. i-Health did not have a basis to remove this action until it was served with  
19 the SAC, which purports to bring claims on behalf of a nationwide class of  
20 consumers and thereby makes the amount in controversy greater than \$5,000,000.  
21 As a result, i-Health's filing of this Notice of Removal is timely. *See* 28 U.S.C.  
22 §1446(b)(3).

23 12. Pursuant to 28 U.S.C. § 1446(d), copies of this Notice of Removal are  
24 being served upon counsel for Plaintiff and filed with the Clerk of the Superior  
25 Court of California for the County of Los Angeles.

26 Based upon the foregoing, i-Health therefore respectfully submits: (i) that  
27 this Court has diversity jurisdiction under 28 U.S.C. §§ 1332, 1441, 1446, and  
28 1453; and (ii) that the procedural requirements under 28 U.S.C. § 1446 are met. As



1 such, this action is properly removable to federal court.  
2

3 Date: June 22, 2012

HOGAN LOVELLS US LLP

4  
5 By:

  
Robert B. Hawk

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7 Attorneys for Defendant  
I-HEALTH, INC.  
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## **EXHIBIT A**

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& BALINT, P.C.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF LOS ANGELES

AMY JOVEL, On Behalf of Herself and  
All Others Similarly Situated,

Plaintiff,

v.

I-HEALTH, INC., a Delaware  
Corporation

Defendant.

Case No.:

**CLASS ACTION COMPLAINT FOR:**

1. VIOLATION OF THE UNFAIR  
COMPETITION LAW, Business and  
Professions Code §17200 *et seq.*;
2. VIOLATION OF THE CONSUMERS  
LEGAL REMEDIES ACT,  
Civil Code §1750 *et seq.*; and
3. BREACH OF EXPRESS  
WARRANTY.

DEMAND FOR JURY TRIAL

1 Plaintiff Amy Jovel brings this action on behalf of herself and all others similarly  
2 situated against Defendant I-Health, Inc. and states:

3 **NATURE OF ACTION**

4 1. Defendant manufactures, markets, sells and distributes BrainStrong, a line  
5 of four dietary supplements fortified with highly processed fermented algae.<sup>1</sup> Through an  
6 extensive, widespread, comprehensive and uniform nationwide marketing campaign,  
7 Defendant claims that taking its BrainStrong products will support brain health. On each  
8 and every BrainStrong Toddler and Kids package, where it cannot be missed by  
9 consumers, Defendant prominently states that BrainStrong "Supports brain development  
10 and function". Similarly, on each and every BrainStrong Adult package, Defendant  
11 represents that the product is "clinically shown to improve memory", "naturally supports  
12 mental clarity" and "helps protect against normal cognitive decline" (hereinafter "the  
13 brain health representations"). The brain health representations appear prominently on the  
14 front of each and every BrainStrong box.

15 2. In truth, the BrainStrong products do not support brain health in children or  
16 adults. Clinical cause and effect studies have consistently found no causative link  
17 between DHA algal oil supplementation and brain health. Defendant's representations are  
18 false, misleading, and reasonably likely to deceive the public.

19 3. Defendant has employed numerous methods to convey its uniform,  
20 deceptive brain health representations to consumers, starting with the Products'  
21 "BrainStrong" name, its website and in its online and print promotional materials and,  
22 importantly, prominently on the front and center of the Products' packaging where the  
23 brain health representations cannot be missed by consumers. The only reason a consumer  
24 would purchase BrainStrong is to obtain the advertised brain health benefits, which are the

25  
26 <sup>1</sup> These products include: (1) BrainStrong Prenatal; (2) BrainStrong Toddler; (3) BrainStrong  
27 Kids; and (4) BrainStrong Adults. This lawsuit concerns only three of the products --  
28 BrainStrong Toddler, BrainStrong Kids and BrainStrong Adults (collectively "BrainStrong" or  
"the Products").

1 only represented benefits and which the Products do not provide.

2 4. As a result of Defendant's deceptive brain health representations, consumers  
3 – including Plaintiff and members of the proposed Class – have purchased Products that  
4 do not perform as advertised.

5 5. Plaintiff brings this action on behalf of herself and other similarly situated  
6 consumers in California who have purchased BrainStrong to halt the dissemination of this  
7 false, misleading and deceptive advertising message, correct the false and misleading  
8 perception it has created in the minds of consumers, and obtain redress for those who have  
9 purchased the Products. Plaintiff alleges violations of the Consumers Legal Remedies  
10 Act, the Unfair Competition Law, and Breach of Express Warranty created by  
11 Defendant's advertising, including false labeling.

#### 12 JURISDICTION AND VENUE

13 6. This Court has jurisdiction over Defendant and the claims set forth below  
14 pursuant to Code of Civil Procedure §410.10 and the California Constitution, Article VI  
15 §10, because this case is a cause not given by statute to other trial courts.

16 7. This Court has jurisdiction over Defendant because it is a corporation that  
17 does substantial business in California, including Los Angeles County. Defendant  
18 promotes, markets, distributes and sells BrainStrong in Los Angeles County, causing  
19 Defendant to incur both obligations and liabilities in Los Angeles County.

20 8. The amount in controversy does not exceed \$74,999.00 with respect to  
21 Plaintiff's claim and the Class members' claims as a whole do not exceed the  
22 jurisdictional limit of \$5,000,000 for purposes of establishing jurisdiction diversity  
23 jurisdiction pursuant to the Class Action Fairness Act. More than two thirds of the  
24 members of the Class currently reside in California. The amount in controversy  
25 requirement exceeds the jurisdiction minimum of this Court.

26 9. Venue is proper in Los Angeles County because Defendant systemically and  
27 continuously transacts business in Los Angeles County California and the transactions

28 *Exh. A*



1 with Plaintiff took place in Los Angeles County, California

## 2 **PARTIES**

3 10. Plaintiff Amy Jovel resides in Los Angeles County, California. In or around  
4 December 2011, Plaintiff Jovel purchased one box of BrainStrong Kids from a Wal-Mart  
5 in Los Angeles, California. Prior to purchasing BrainStrong Kids, Plaintiff Jovel was  
6 exposed to and saw Defendant's advertisements claiming that the Products support brain  
7 health in adults and children. Prior to purchasing the Product, Plaintiff also read the  
8 BrainStrong Kids label reaffirming the claims she saw in the advertisements. Relying on  
9 these claims, Plaintiff Jovel purchased BrainStrong Kids, believing the Product supported  
10 brain health. She paid approximately \$15 for the Product. Plaintiff gave the Product to  
11 her daughter as directed. The BrainStrong Kids product Plaintiff purchased does not  
12 support brain health as represented. As a result, Plaintiff suffered injury in fact and lost  
13 money. Had Plaintiff known the truth about Defendant's misrepresentations and  
14 omissions, she would not have purchased BrainStrong Kids.

15 11. Defendant I-Health, Inc ("I-Health") is a corporation organized and existing  
16 under the laws of the state of Delaware. I-Health's headquarters is at 55 Sebeth Drive,  
17 Suite 102, Cromwell, Connecticut 06416. Defendant I-Health manufactured, advertised,  
18 marketed, distributed and sold the BrainStrong products throughout California.

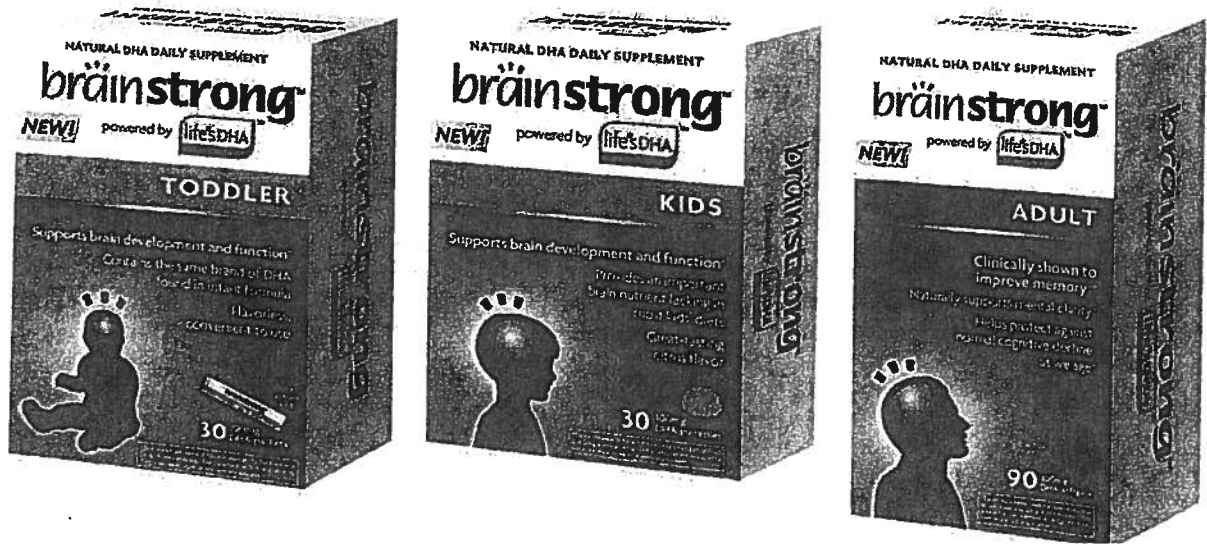
## 19 **FACTUAL ALLEGATIONS**

### 20 ***The BrainStrong Products***

21 12. Since April 2011, Defendant has manufactured, distributed, marketed and  
22 sold its BrainStrong products throughout California. This lawsuit concerns three of those  
23 products: (1) BrainStrong Toddler; (2) BrainStrong Kids; (3) and BrainStrong Adults.

24 13. Defendant's BrainStrong products are sold in virtually every major food,  
25 drug, and mass retail outlet in the country. The Products retail for approximately \$15-  
26 \$30. The following are screen shots of the Products:

27  
28 *En. A*  
8



14. Since the Products' launch, Defendant has consistently conveyed the message to consumers throughout California that its BrainStrong products provide an essential daily supplement fortified with DHA algal oil that "supports brain health and function" in children and adults. They do not. Defendant's brain health representations are false, misleading and deceptive.

15. All three BrainStrong products contain "life's DHA". DHA is a long-chain omega-3 fatty acid typically found in cold water fish. The DHA in Defendant's BrainStrong products is not derived from fish oil. Instead, the DHA oil in Defendant's products is an immature short-chain omega-3 fatty acid made from an extract of mutated and fermented algae. Contrary to Defendant's representations made on each and every Product package, DHA algal oil does not support brain health.

16. There are no competent and reliable scientific studies that DHA algal oil supplementation supports brain health. The one and only "reference" appearing on any of the Products is on the BrainStrong Adult label, purportedly supporting Defendant's "clinically shown to improve memory" representation. But, no identifying information is included with the "reference" to enable consumers to locate and review the "reference". The "reference" is not competent and reliable scientific support for Defendant's brain

1 health representation.

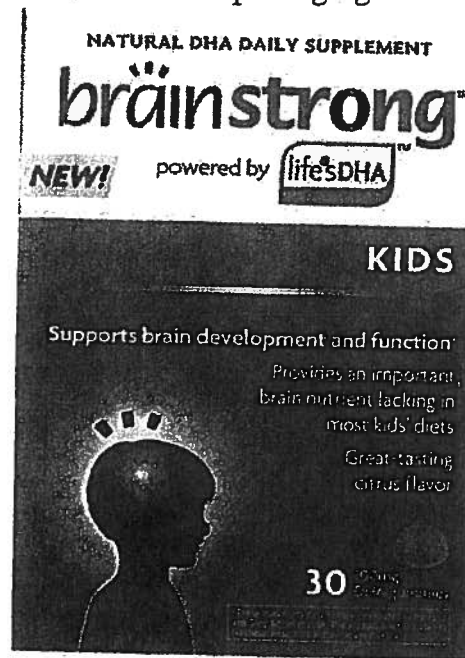
2 17. In truth, clinical cause and effect studies establish that Defendant's brain  
3 health representations are deceptive. For example, in Kirby, A., et. al., *A Double-Blind,*  
4 *Placebo-Controlled Study Investigating the Effects of Omega-3 Supplementation in*  
5 *Children Aged 8-10 Years from a Mainstream School Population*, 31(3) *Research in*  
6 *Developmental Disabilities* 718-30 (2010), the study authors examined the effects of fish  
7 oil DHA supplementation on 450 students (ages 8-10 years old) for 16 weeks. *Id.* at 720.  
8 The study authors found that despite the wide range of cognitive and behavior outcomes  
9 used, DHA supplementation resulted in no significant differences in cognitive results:  
10 "very few significant differences between the supplemented and placebo group on the  
11 learning and performance measures used." *Id.* at 729.

12 18. Similarly, a 2008 study funded by Martek Biosciences, the manufacturers of  
13 the Life's DHA in the Products, concluded that there was no statistically significant  
14 difference between the DHA and placebo group in cognitive function. *See* Ryan, A., et  
15 al., *Assessing the Effect of Docosahexaemoic Acid on Cognitive Functions in Healthy*  
16 *Preschool Children*, 47(4) *Clin. Pediatr.* 355-62 (2008) (the Ryan Study).<sup>2</sup> *See also*  
17 Eilander, A., et al., *Effects of n-3 long chain polyunsaturated fatty acid supplementation*  
18 *on visual and cognitive development throughout childhood: a review of human studies*,  
19 76(4) *J. Prostaglandins, Leukotrienes and Essential Fatty Acids* 189-203 (Apr. 2007)  
20 ("Evidence for benefits of n-3 LCPUFA on cognitive development in healthy children  
21 older than 2 years of age is too limited to allow a clear conclusion.").

22 19. These and other competent and reliable scientific studies have found no  
23 cause and effect relationship between intake of dietary supplements with DHA algal oil  
24 and cognitive development. Defendant's brain health representations are false and  
25 misleading and reasonably likely to deceive the average consumer.

26  
27 <sup>2</sup> This study examined 175 4-year old children who received either 400 mg/d of DHA derived  
28 from the microalgae *Schizochytrium* spp or a placebo in capsules for 4 months.

1           20. Despite the lack of any competent and reliable scientific evidence that DHA  
2 algal oil supplementation supports brain health and the overwhelming evidence that it  
3 does not, each and every Product package repeatedly emphasizes that the BrainStrong  
4 products support brain health. Each and every consumer who purchases the Products is  
5 exposed to these deceptive brain health representations, which appear prominently and  
6 conspicuously on the front of the Products' packaging:



18           21. And, the entire backside panel is dedicated to promoting the DHA algal oil  
19 in Defendant's Products and its purported ability to support brain health:

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25. Nonetheless, Defendant conveyed and continues to convey one uniform message through its advertising campaign: BrainStrong supports brain health in children and adults.

26. Plaintiff and Class members have been and will continue to be deceived or misled by Defendant's deceptive brain health representations. Plaintiff purchased and consumed the Product during the relevant time period and in doing so, read and considered the Product labels and based her decision to buy the Product on the brain health representations. Defendant's brain health representations and omissions were a material factor in influencing Plaintiff's decision to purchase and give her daughter the Product. Plaintiff would not have purchased the Product had she known that Defendant's claims were false and misleading, that Defendant did not possess competent and reliable scientific evidence to support its brain health representations, and that clinical cause-and-effect studies have found no causative link between DHA algal oil supplementation and brain health.

27. As a result, Plaintiff and the Class members have been damaged in their purchases of these Products and have been deceived into purchasing Products that they believed, based on Defendant's representations, supported brain health, when, in fact, they do not.

28. Defendant, by contrast, reaped enormous profits from its false marketing and sale of these products.

## CLASS DEFINITION AND ALLEGATIONS

29. Plaintiff brings this action on behalf of herself and all similarly situated consumers pursuant to C.C.P. §382 and Cal. Civ. Code §1781. The Class of persons whom plaintiff seeks to represent is defined as:

**All California consumers who purchased BrainStrong Toddler, BrainStrong Kids and/or BrainStrong Adults.**

1 Excluded from the Class are Defendant and its officers, directors  
2 and employees and those who purchased BrainStrong for the  
3 purpose of resale.

4 30. Plaintiff and the members of the Class are so numerous and geographically  
5 dispersed throughout the State of California that joinder of all members individually is  
6 impracticable. While the exact number and identities of the Class members are unknown  
7 at this time, such information can be ascertained through appropriate investigation and  
8 discovery.

9 31. The disposition of Plaintiff's and proposed Class members' claims in a class  
10 action will provide substantial benefits to both the parties and the Court.

11 32. The proposed Class is ascertainable and there is a well-defined community  
12 of interest in the questions of law or fact alleged herein since the rights of each proposed  
13 Class member were infringed or violated in a similar fashion based upon Defendant's  
14 uniform warranties and misrepresentations and material omissions about its BrainStrong  
15 products.

16 33. The questions of law and fact common to the proposed Class predominate  
17 over questions that may affect particular proposed Class members. Common questions of  
18 fact and law include, but are not limited to, the following:

19 (a) whether the claims discussed above are true, or are misleading, or  
20 reasonably likely to deceive;

21 (b) whether Defendant's alleged conduct violates public policy;

22 (c) whether the alleged conduct constitutes violations of the laws  
23 asserted;

24 (d) whether Defendant engaged in false or misleading advertising;

25 (e) whether Plaintiff and Class members have sustained monetary loss  
26 and the proper measure of that loss;

27 (f) whether Plaintiff and Class members are entitled to restitution and  
28 disgorgement of damages; and

1 (g) whether Plaintiff and Class members are entitled to declaratory and  
2 injunctive relief.

3 34. Judicial determination of the common legal and factual issues essential to  
4 this case would be far more efficient and economical as a class action than in piecemeal  
5 individual determinations.

6 35. Plaintiff's claims are typical of the claims of the members of the Class  
7 because, *inter alia*, all Class members were injured through the uniform misconduct  
8 described above, and were subject to Defendant's deceptive brain health representations,  
9 including the deceptive brain health representations that accompanied each and every box  
10 of BrainStrong. Plaintiff is advancing the same claims and legal theories on behalf of  
11 herself and all members of the Class.

12 36. Plaintiff is willing and prepared to serve the Court and the proposed Class in  
13 a representative capacity with all of the obligations and duties material thereto. Plaintiff  
14 will fairly and adequately protect the interests of the Class and has no interests adverse to  
15 or which directly and irrevocably conflict with the interests of other members of the Class.

16 37. The self interests of the Plaintiff are co-extensive with, and not antagonistic  
17 to, those of the absent Class members. Plaintiff will undertake to represent and protect the  
18 interests of the absent Class members.

19 38. Plaintiff has engaged the services of counsel indicated below. Counsel are  
20 experienced in complex class action litigation, will adequately prosecute this action, and  
21 will assert and protect the rights of, and otherwise will represent the plaintiff and absent  
22 Class members.

23 39. Plaintiff seeks preliminary and permanent injunctive and equitable relief on  
24 behalf of the entire Class, on grounds generally applicable to the entire Class, to enjoin  
25 and prevent Defendant from engaging in the acts described, and requiring Defendant to  
26 provide full restitution to Plaintiff and Class members.

1           40. Unless a Class is certified, Defendant will retain monies received as a result  
2 of its conduct that were taken from Plaintiff and Class members. Unless a Class-wide  
3 injunction is issued, Defendant will continue to commit the violations alleged, and the  
4 members of the Class and the general public will continue to be deceived.

5           41. Defendant has acted and refused to act on grounds generally applicable to  
6 the Class, making appropriate final injunctive relief with respect to the Class as a whole.

7  
8                           **COUNT I**

8                           **Violation of Business & Professions Code §17200, et seq.**

9           42. Plaintiff repeats and re-alleges the allegations contained in the paragraphs  
10 above, as if fully set forth herein.

11           43. Plaintiff brings this claim individually and on behalf of the Class.

12           44. As alleged herein, Plaintiff has suffered injury in fact and lost money or  
13 property as a result of Defendant's conduct because she purchased the Product in reliance  
14 on Defendant's brain health representations, but did not receive a product that supports  
15 brain health.

16           45. The Unfair Competition Law, Business & Professions Code §17200, et seq.  
17 ("UCL"), prohibits any "unlawful," "fraudulent" or "unfair" business act or practice and  
18 any false or misleading advertising. In the course of conducting business, Defendant  
19 committed unlawful business practices by, *inter alia*, making the representations (which  
20 also constitute advertising within the meaning of §17200) and omissions of material facts,  
21 as set forth more fully herein, and violating Civil Code §§1572, 1573, 1709, 1711, 1770  
22 and Business & Professions Code §§17200, et seq., 17500, et seq., and the common law.

23           46. Plaintiff and the Class reserve the right to allege other violations of law,  
24 which constitute other unlawful business acts or practices. Such conduct is ongoing and  
25 continues to this date.

26           47. Defendant's actions also constitute "unfair" business acts or practices  
27 because, as alleged above, *inter alia*, Defendant engaged in false advertising,

1 misrepresented and omitted material facts regarding its BrainStrong products, and thereby  
2 offended an established public policy, and engaged in immoral, unethical, oppressive, and  
3 unscrupulous activities that are substantially injurious to consumers.

4 48. As stated in this Complaint, Plaintiff alleges violations of consumer  
5 protection, unfair competition and truth in advertising laws, resulting in harm to  
6 consumers. Defendant's acts and omissions also violate and offend the public policy  
7 against engaging in false and misleading advertising, unfair competition and deceptive  
8 conduct towards consumers. This conduct constitutes violations of the unfair prong of  
9 Business & Professions Code §17200, *et seq.*

10 49. There were reasonably available alternatives to further Defendant's  
11 legitimate business interests, other than the conduct described herein.

12 50. Business & Professions Code §17200, *et seq.*, also prohibits any "fraudulent  
13 business act or practice."

14 51. Defendant's actions, claims, nondisclosures and misleading statements, as  
15 more fully set forth above, were also false, misleading and/or likely to deceive the  
16 consuming public within the meaning of Business & Professions Code §17200, *et seq.*

17 52. Plaintiff and the other Class members have suffered injury in fact and lost  
18 money as a result of these unlawful, unfair, and fraudulent practices.

19 53. As a result of its deception, Defendant has been able to reap unjust revenue  
20 and profit.

21 54. Unless restrained and enjoined, Defendant will continue to engage in the  
22 above-described conduct. Accordingly, injunctive relief is appropriate.

23 55. Plaintiff, on behalf of herself, all others similarly situated, and the general  
24 public, seeks restitution of all money obtained from Plaintiff and the members of the Class  
25 collected as a result of unfair competition, an injunction prohibiting Defendant from  
26 continuing such practices, corrective advertising and all other relief this Court deems  
27 appropriate, consistent with Business & Professions Code §17203.

28 Eph: A



**COUNT II**  
**Violations of the Consumers Legal Remedies Act –**  
**Civil Code §1750 *et seq.***

56. Plaintiff repeats and re-alleges the allegations contained in the paragraphs above, as if fully set forth herein.

57. Plaintiff brings this claim individually and on behalf of the Class.

58. This cause of action is brought pursuant to the Consumers Legal Remedies Act, California Civil Code §1750, *et seq.* (the “Act”). Plaintiff is a consumer as defined by California Civil Code §1761(d). The BrainStrong products are “goods” within the meaning of the Act.

59. Defendant violated and continues to violate the Act by engaging in the following practices proscribed by California Civil Code §1770(a) in transactions with Plaintiff and the Class which were intended to result in, and did result in, the sale of the BrainStrong products:

(5) Representing that [the BrainStrong products have]... approval, characteristics, . . . uses [and] benefits . . . which [they do] not have . . .

\* \* \*

(7) Representing that [the BrainStrong products are] of a particular standard, quality or grade . . . if [they are] of another.

\* \* \*

(9) Advertising goods . . . with intent not to sell them as advertised.

\* \* \*

(16) Representing that [the BrainStrong products have] been supplied in accordance with a previous representation when [they have] not.

60. Defendant violated the Act by representing and failing to disclose material facts on the BrainStrong labels and associated advertising, as described above, when it

Exh. A  
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1 knew, or should have known, that the representations were false and misleading and that  
2 the omissions were of material facts it was obligated to disclose.

3 61. Pursuant to California Civil Code §1782(d), Plaintiff and the Class seek a  
4 Court order enjoining the above-described wrongful acts and practices of Defendant and  
5 for restitution and disgorgement.

6 62. Pursuant to §1782 of the Act, Plaintiff notified Defendant in writing by  
7 certified mail of the particular violations of §1770 of the Act and demanded that  
8 Defendant rectify the problems associated with the actions detailed above and give notice  
9 to all affected consumers of Defendant's intent to so act. A copy of the letter is attached  
10 hereto as Exhibit B.

11 63. If Defendant fails to rectify or agree to rectify the problems associated with  
12 the actions detailed above and give notice to all affected consumers within 30 days of the  
13 date of written notice pursuant to §1782 of the Act, Plaintiff will amend this complaint to  
14 add claims for actual, punitive and statutory damages, as appropriate.

15 64. Pursuant to §1780(d) of the Act, attached hereto as Exhibit C is the affidavit  
16 showing that this action has been commenced in the proper forum.

17  
18 **COUNT III**  
**Breach of Express Warranty**

19 65. Plaintiff repeats and re-alleges the allegations contained in the paragraphs  
20 above, as if fully set forth herein.

21 66. Plaintiff brings this claim individually and on behalf of the Class.

22 67. Defendant expressly warranted on each and every box of BrainStrong that  
23 the Products "support brain development and function" in children and adults alike. The  
24 brain health representations made by Defendant are affirmations of fact that became part  
25 of the basis of the bargain and created an express warranty that the goods would conform  
26 to the stated promise. Plaintiff placed importance on Defendant's brain health  
27 representations.

1           68. All conditions precedent to Defendant's liability under this contract have  
2 been performed by Plaintiff and the Class.

3           69. Defendant breached the terms of this contract, including the express  
4 warranties, with Plaintiff and the Class by not providing a Product that would support  
5 brain health as represented.

6           70. As a result of Defendant's breach of its contract, Plaintiff and the Class have  
7 been damaged in the amount of the price of the Products they purchased.

8                                   **PRAYER FOR RELIEF**

9       Wherefore, Plaintiff prays for a judgment:


- 10           A. Certifying the Class as requested herein;
- 11           B. Awarding Plaintiff and the proposed Class members damages;
- 12           C. Awarding restitution and disgorgement of Defendant's revenues to Plaintiff  
13 and the proposed Class members;
- 14           D. Awarding injunctive relief as permitted by law or equity, including  
15 enjoining Defendant from continuing the unlawful practices as set forth herein;
- 16           E. Ordering Defendant to engage in a corrective advertising campaign;
- 17           F. Awarding attorneys' fees and costs; and
- 18           G. Providing such further relief as may be just and proper.

19                                   **DEMAND FOR JURY TRIAL**

20       Plaintiff hereby demands a trial of her claims by jury to the extent authorized by  
21 law.

22       Dated: March 16, 2012

23                                   BONNETT, FAIRBOURN, FRIEDMAN  
24                                   & BALINT, P.C.

25                                     
26                                   Todd D. Carpenter  
27                                   600 W. Broadway, Suite 900  
28                                   San Diego, California 92101  
                                  [tcarpenter@bffb.com](mailto:tcarpenter@bffb.com)

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BONNETT, FAIRBOURN, FRIEDMAN  
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LEVIN, FISHBEIN, SEDRAN & BERMAN

Howard J. Sedran

510 Walnut Street

Philadelphia, Pennsylvania 19106

Telephone: 215-592-1500

Attorneys for Plaintiff







# SUMMONS (CITACION JUDICIAL)

## NOTICE TO DEFENDANT: (AVISO AL DEMANDADO):

I-Health, Inc., a Delaware corporation

## YOU ARE BEING SUED BY PLAINTIFF: (LO ESTÁ DEMANDANDO EL DEMANDANTE):

Amy Jewel, On Behalf of Herself and All Others Similarly Situated

FOR COUNTY USE ONLY  
OTRO PARA USO DELA CORTE

8123400

CONFORMED COPY  
ORIGINAL FILED  
CLERK OF SUPERIOR COURT  
COUNTY OF LOS ANGELES

MAR 18 2012

Clerk, by  
(Secretario)

Deputy  
(Aguado)

CASE NUMBER: BC481048

NOTICE: You have been sued. The court may decide against you without your being heard unless you respond to this summons. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at the court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center ([www.courtinfo.ca.gov/selfhelp](http://www.courtinfo.ca.gov/selfhelp)), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site ([www.legalaid.org](http://www.legalaid.org)), the California Courts Online Self-Help Center ([www.courtinfo.ca.gov/selfhelp](http://www.courtinfo.ca.gov/selfhelp)), or by contacting your local court or county bar association. NOTICE: The court has a statutory fee or waived fee and costs on any judgment or arbitration award of \$10,000 or more in a civil case. The courts can must be paid before the court will dismiss the case. (AVISO: Lo han demandado. Si no responde dentro de 30 días, la corte puede decidir en su contra sin escuchar su versión. Lea la información a continuación.)

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto al menos que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California ([www.courtinfo.ca.gov](http://www.courtinfo.ca.gov)), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida el subsidio de la corte que le dé un formulario de solicitud de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otras reglas legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de referencia de abogados. Si no puede pagar a un abogado, es posible que califique con las reglas para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services ([www.legalaid.org](http://www.legalaid.org)), en el Centro de Ayuda de las Cortes de California ([www.courtinfo.ca.gov](http://www.courtinfo.ca.gov)) o póngase en contacto con la corte o el colegio de abogados local. AVISO: Por ley, la corte tiene derecho a recibir las costas y los costos antes por imponer un gravamen sobre pagar el gravamen de la corte antes de que la corte pueda desear el caso.

The name and address of the court is:

(El nombre y dirección de la corte es: Stanley Mosk Courthouse

111 N. Hill Street

Los Angeles, CA 90012

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es:

Bonnett, Fairbourn, Friedman & Belfin, 604 W. Broadway, Ste. 900, San Diego, CA 92101 (619) 756-6978

DATE:

(Fecha)

For proof of service of this summons, use Proof of Service of Summons form (POS-010).

(Para prueba de entrega de esta citación use el formulario Proof of Service Summons, (POS-010)).

(REAL)

## NOTICE TO THE PERSON SERVED: You are served

- ☐ as an individual defendant.
- ☐ as the person sued under the fictitious name of (specify):

- ☒ on behalf of (specify): **I-HEALTH, INC., A DELAWARE CORPORATION**

- under:
- |  |   |
|--|---|
| <input checked="" type="checkbox"/> CCP 418.10 (corporation)     | <input type="checkbox"/> CCP 418.60 (minor)             |
| <input type="checkbox"/> CCP 418.20 (defunct corporation)        | <input type="checkbox"/> CCP 418.70 (corporate trustee) |
| <input type="checkbox"/> CCP 418.40 (association or partnership) | <input type="checkbox"/> CCP 418.80 (authorized person) |
| <input type="checkbox"/> other (specify):                        |   |

- ☐ by personal delivery on (date):

Form Adopted for Mandatory Use  
Judicial Council of California  
8123-100 (Rev. July 1, 2008)

SUMMONS

Page 1 of 1  
Clerk of Court Francisco J. 412.55, 412  
[www.courtinfo.ca.gov](http://www.courtinfo.ca.gov)

Exh. A

22

<b>ATTORNEY OR PARTY WITHOUT ATTORNEY</b> (Please, State Bar number, and address): Todd D. Carpenter (234448) Bennett, Friedman, Friedman & Bafint, P.C. 600 W. Broadway, Suite 900 San Diego, CA 92101 Telephone No. 619-736-6973		<b>FOR COURT USE ONLY</b>  <div style="text-align: center;"> <b>CONFIRMED COPY</b>  <b>ORIGINAL FILED</b>  <b>SUPERIOR COURT OF CALIFORNIA</b>  <b>COUNTY OF LOS ANGELES</b>  <b>MAR 16 2012</b>  <i>John A. Clark, Executive Officer/Clerk</i>  <b>BC 48-048</b> </div>	
<b>ATTORNEY FOR Plaintiff</b> <b>Plaintiff Amy Joyal</b> SUPERIOR COURT OF CALIFORNIA, COUNTY OF Los Angeles STREET ADDRESS: 111 N. Hill Street MAILING ADDRESS: CITY AND ZIP CODE: Los Angeles, CA 90012 COURTHOUSE: Stanley Mosk Courthouse		<b>CASE NAME:</b> <b>Joyal v. I-Health, Inc.</b>	
<b>CIVIL CASE COVER SHEET</b> <input checked="" type="checkbox"/> <b>Unlimited</b> (Amount demanded exceeds \$25,000) <input type="checkbox"/> <b>Limited</b> (Amount demanded is \$25,000 or less)		<b>Complex Case Designation</b> <input type="checkbox"/> <b>Counter</b> <input type="checkbox"/> <b>Joinder</b> Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)	
Items 1-8 below must be completed (see instructions on page 2).			
<b>1. Check one box below for the case type that best describes this case:</b>			
<input type="checkbox"/> <b>Auto Tort</b> <input type="checkbox"/> <b>Auto (22)</b> <input type="checkbox"/> <b>Uninsured motorist (48)</b> <input type="checkbox"/> <b>Other PUPDWD (Personal Injury/Property Damage/Wrongful Death) Tort</b> <input type="checkbox"/> <b>Automobile (14)</b> <input type="checkbox"/> <b>Product liability (24)</b> <input type="checkbox"/> <b>Medical malpractice (46)</b> <input type="checkbox"/> <b>Other PUPDWD (23)</b> <input checked="" type="checkbox"/> <b>Non-PUPDWD (Other) Tort</b> <input type="checkbox"/> <b>Business tort/tortious business practice (37)</b> <input type="checkbox"/> <b>Civil rights (40)</b> <input type="checkbox"/> <b>Defamation (13)</b> <input type="checkbox"/> <b>Fraud (16)</b> <input type="checkbox"/> <b>Intellectual property (19)</b> <input type="checkbox"/> <b>Professional negligence (28)</b> <input type="checkbox"/> <b>Other non-PUPDWD tort (36)</b> <input type="checkbox"/> <b>Employment</b> <input type="checkbox"/> <b>Wrongful termination (30)</b> <input type="checkbox"/> <b>Other employment (15)</b>	<input type="checkbox"/> <b>Contract</b> <input type="checkbox"/> <b>Breach of contract/warranty (06)</b> <input type="checkbox"/> <b>Rule 6.740 collections (09)</b> <input type="checkbox"/> <b>Other collections (03)</b> <input type="checkbox"/> <b>Insurance coverage (18)</b> <input type="checkbox"/> <b>Other contract (37)</b> <input type="checkbox"/> <b>Real Property</b> <input type="checkbox"/> <b>Eviction/delinquency/condemnation (14)</b> <input type="checkbox"/> <b>Wrongful eviction (23)</b> <input type="checkbox"/> <b>Other real property (33)</b> <input type="checkbox"/> <b>Unlawful Detainer</b> <input type="checkbox"/> <b>Commercial (31)</b> <input type="checkbox"/> <b>Residential (32)</b> <input type="checkbox"/> <b>Drugs (32)</b> <input type="checkbox"/> <b>Judicial Review</b> <input type="checkbox"/> <b>Asset forfeiture (25)</b> <input type="checkbox"/> <b>Petition for arbitration award (11)</b> <input type="checkbox"/> <b>Will or mandate (22)</b> <input type="checkbox"/> <b>Other judicial orders (34)</b>	<input type="checkbox"/> <b>Provisionally Complex Civil Litigation</b> (Cal. Rules of Court, rules 3.400-3.403) <input type="checkbox"/> <b>Antitrust/Trade regulation (03)</b> <input type="checkbox"/> <b>Construction defect (10)</b> <input type="checkbox"/> <b>Mass tort (40)</b> <input type="checkbox"/> <b>Securities litigation (24)</b> <input type="checkbox"/> <b>Environmental/Trade tort (30)</b> <input type="checkbox"/> <b>Insurance coverage disputes arising from the above listed provisionally complex case types (11)</b> <input type="checkbox"/> <b>Enforcement of Judgment</b> <input type="checkbox"/> <b>Enforcement of judgment (20)</b> <input type="checkbox"/> <b>Multiparty Civil Complaint</b> <input type="checkbox"/> <b>FRCO (27)</b> <input type="checkbox"/> <b>Other complaint (not specified above) (43)</b> <input type="checkbox"/> <b>Miscellaneous Civil Petition</b> <input type="checkbox"/> <b>Partnership and corporate governance (31)</b> <input type="checkbox"/> <b>Other petition (not specified above) (43)</b>	
<b>2. This case <input type="checkbox"/> is <input checked="" type="checkbox"/> is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:</b> a. <input type="checkbox"/> Large number of separately represented parties    d. <input type="checkbox"/> Large number of witnesses b. <input type="checkbox"/> Extensive motion practice making difficult or novel issues that will be time-consuming to resolve    e. <input type="checkbox"/> Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court c. <input type="checkbox"/> Substantial amount of documentary evidence    f. <input type="checkbox"/> Substantial postjudgment judicial supervision			
<b>3. Remedies sought (check all that apply):</b> a. <input checked="" type="checkbox"/> monetary    b. <input checked="" type="checkbox"/> nonmonetary declaratory or injunctive relief    c. <input type="checkbox"/> punitive			
<b>4. Number of causes of action (specify):</b> <u>3</u>			
<b>5. This case <input checked="" type="checkbox"/> is <input type="checkbox"/> is not a class action suit.</b>			
<b>6. If there are any known related cases, file and serve a notice of related case. (You may use form JS-016.)</b>			
Date: March 16, 2012 Todd D. Carpenter			
<div style="text-align: center;"> <b>NOTICE</b>          Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed in partitions).          • File this cover sheet in addition to any cover sheet required by local court rule.          • If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.          • Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.       </div>			

CIVIL CASE COVER SHEET

A TRUE COPY ATTEST  
  
 PROCESS SERVER  
 MICHAEL WALTON

Exh. A  
23



**INSTRUCTIONS ON HOW TO COMPLETE THE COVER SHEET**

CM-010

**To Plaintiffs and Others Filing First Papers.** If you are filing a first paper (for example, a complaint) in a civil case, you must complete and file, along with your first paper, the *Civil Case Cover Sheet* contained on page 1. This information will be used to compile statistics about the types and numbers of cases filed. You must complete items 1 through 6 on the sheet. In item 1, you must check one box for the case type that best describes the case. If the case fits both a general and a more specific type of case listed in item 1, check the more specific one. If the case has multiple causes of action, check the box that best indicates the primary cause of action. To assist you in completing the sheet, examples of the cases that belong under each case type in item 1 are provided below. A cover sheet must be filed only with your initial paper. Failure to file a cover sheet with the first paper filed in a civil case may subject a party, its counsel, or both to sanctions under rules 2.30 and 3.220 of the California Rules of Court.

**To Parties in Rule 3.740 Collections Cases.** A "collections case" under rule 3.740 is defined as an action for recovery of money owed in a sum stated to be certain that is not more than \$25,000, exclusive of interest and attorney's fees, arising from a transaction in which property, services, or money was acquired on credit. A collections case does not include an action seeking the following: (1) tort damages, (2) punitive damages, (3) recovery of real property, (4) recovery of personal property, or (5) a prejudgment writ of attachment. The identification of a case as a rule 3.740 collections case on this form means that it will be exempt from the general time-for-service requirements and case management rules, unless a defendant files a responsive pleading. A rule 3.740 collections case will be subject to the requirements for service and obtaining a judgment in rule 3.740.

**To Parties in Complex Cases.** In complex cases only, parties must also use the *Civil Case Cover Sheet* to designate whether the case is complex. If a plaintiff believes the case is complex under rule 3.400 of the California Rules of Court, this must be indicated by completing the appropriate boxes in items 1 and 2. If a plaintiff designates a case as complex, the cover sheet must be served with the complaint on all parties to the action. A defendant may file and serve no later than the time of its first appearance a joinder in the plaintiff's designation, a counter-designation that the case is not complex, or, if the plaintiff has made no designation, a designation that the case is complex.

**CASE TYPES AND EXAMPLES****Auto Tort**

Auto (22)—Personal Injury/Property Damage/Wrongful Death

Uninsured Motorist (46) (if the case involves an uninsured motorist claim subject to arbitration, check this item instead of Auto)

Other P/DPD/WD (Personal Injury/Property Damage/Wrongful Death) Tort

Asbestos (04)

Asbestos Property Damage

Asbestos Personal Injury/Wrongful Death

Product Liability (not asbestos or toxic/environmental) (24)

Medical Malpractice (46)

Medical Malpractice—

Physicians & Surgeons

Other Professional Health Care Malpractice

Other P/DPD/WD (23)

Premises Liability (e.g., slip and fall)

Intentional Bodily Injury/DPD/WD (e.g., assault, vandalism)

Intentional Infliction of Emotional Distress

Negligent Infliction of Emotional Distress

Other P/DPD/WD

Non-P/DPD/WD (Other) Tort

Business Tort/Unfair Business Practice (07)

Civil Rights (e.g., discrimination, false arrest) (not civil harassment) (08)

Defamation (e.g., slander, libel) (13)

Fraud (16)

Intellectual Property (19)

Professional Negligence (25)

Legal Malpractice

Other Professional Malpractice (not medical or legal)

Other Non-P/DPD/WD Tort (35)

Employment

Wrongful Termination (36)

Other Employment (15)

**Contract**

Breach of Contract/Warranty (06)

Breach of Rental/Lease

Contract (not unlawful detainer or wrongful eviction)

Contract/Warranty Breach—Seller Plaintiff (not fraud or negligence)

Negligent Breach of Contract/Warranty

Other Breach of Contract/Warranty Collections (e.g., money owed, open book accounts) (09)

Collection Case—Seller Plaintiff

Other Promissory Note/Collections Case

Insurance Coverage (not provisionally complex) (18)

Auto Subrogation

Other Coverage

Other Contract (37)

Contractual Fraud

Other Contract Dispute

**Real Property**

Eminent Domain/Inverse

Condemnation (14)

Wrongful Eviction (33)

Other Real Property (e.g., quiet title) (28)

Writ of Possession of Real Property

Mortgage Foreclosure

Quiet Title

Other Real Property (not eminent domain, landlord/tenant, or foreclosure)

**Unlawful Detainer**

Commercial (31)

Residential (32)

Drugs (38) (if the case involves illegal drugs, check this item; otherwise, report as Commercial or Residential)

**Judicial Review**

Asset Forfeiture (05)

Petition Re: Arbitration Award (11)

Writ of Mandate (02)

Writ—Administrative Mandamus

Writ—Mandamus on Limited Court

Case Matter

Writ—Other Limited Court Case

Review

Other Judicial Review (39)

Review of Health Officer Order

Notice of Appeal—Labor

Commissioner Appeals

Provisionally Complex Civil Litigation (Cal. Rules of Court Rules 3.400–3.403)

Antitrust/Trade Regulation (03)

Construction Defect (10)

Claims Involving Mass Tort (40)

Securities Litigation (28)

Environmental/Toxic Tort (30)

Insurance Coverage Claims

(arising from provisionally complex case type listed above) (41)

**Enforcement of Judgment**

Enforcement of Judgment (20)

Abstract of Judgment (Out of County)

Confession of Judgment (non-domestic relations)

Sister State Judgment

Administrative Agency Award (not unpaid taxes)

Petition/Certification of Entry of Judgment on Unpaid Taxes

Other Enforcement of Judgment Case

Miscellaneous Civil Complaint RICO (27)

Other Complaint (not specified above) (42)

Declaratory Relief Only

Injunctive Relief Only (non-harassment)

Mechanics Lien

Other Commercial Complaint Case (non-tort/non-complex)

Other Civil Complaint (non-tort/non-complex)

**Miscellaneous Civil Petition**

Partnership and Corporate Governance (21)

Other Petition (not specified above) (43)

Civil Harassment

Workplace Violence

Elder/Dependent Adult Abuse

Election Contest

Petition for Name Change

Petition for Relief from Late Claim

Other Civil Petition

SHORT TITLE <b>Javel v. H-Hall, Inc.</b>	CASE NUMBER <b>BC 481048</b>
---	---------------------------------

**CIVIL CASE COVER SHEET ADDENDUM AND  
STATEMENT OF LOCATION  
(CERTIFICATE OF GROUNDS FOR ASSIGNMENT TO COURTHOUSE LOCATION)**

This form is required pursuant to Local Rule 2.0 in all new civil case filings in the Los Angeles Superior Court.

Item I. Check the types of hearing and fill in the estimated length of hearing expected for this case:

JURY TRIAL? ☐ YES CLASS ACTION? ☒ YES LIMITED CASE? ☐ YES TIME ESTIMATED FOR TRIAL: 14 ☐ HOURS ☒ DAYS

Item II. Indicate the correct district and courthouse location (4 steps - If you checked "Limited Case", skip to Item III, Pg. 4)

**Step 1:** After first completing the Civil Case Cover Sheet form, find the main Civil Case Cover Sheet heading for your case in the left margin below, and, to the right in Column A, the Civil Case Cover Sheet case type you selected.

**Step 2:** Check one Superior Court type of action in Column B below which best describes the nature of this case.

**Step 3:** In Column C, circle the reason for the court location choice that applies to the type of action you have checked. For any exception to the court location, see Local Rule 2.0.

**Applicable Reasons for Choosing Courthouse Location (see Column C below)**

- |  |   |
|--|---|
| <p>1. Class actions must be filed in the Stanley Mosk Courthouse, central district.<br/>May be filed in central district county, or no bodily injury/property damage.<br/>Location where cause of action arose.<br/>Location where bodily injury, death or damage occurred.<br/>2. Location where performance required or defendant resides.</p> | <p>3. Location of property or permanently garaged vehicle.<br/>4. Location where defendant resides.<br/>5. Location where defendant's principal functions wholly.<br/>6. Location where case or more of the parties reside.<br/>10. Location of Labor Commissioner's Office</p> |
|--|---|

**Step 4:** Fill in the information requested on page 4 in Item III; complete Item IV. Sign the declaration.

Auto Tort	Auto (22)	<input type="checkbox"/> A7100 Motor Vehicle - Personal Injury/Property Damage/Wrongful Death	1, 2, 4
	Uninsured Motorist (46)	<input type="checkbox"/> A7110 Personal Injury/Property Damage/Wrongful Death - Uninsured Motorist	1, 2, 4
Other Personal Injury/Property Damage/Wrongful Death Tort	Asbestos (04)	<input type="checkbox"/> A8070 Asbestos Property Damage <input type="checkbox"/> A7221 Asbestos - Personal Injury/Wrongful Death	2 2
	Product Liability (24)	<input type="checkbox"/> A7250 Product Liability (not asbestos or tobacco/environmental)	1, 2, 3, 4, 6
	Medical Malpractice (45)	<input type="checkbox"/> A7310 Medical Malpractice - Physicians & Surgeons <input type="checkbox"/> A7340 Other Professional Health Care Malpractice	1, 4 1, 4
	Other Personal Injury/Property Damage/Wrongful Death (23)	<input type="checkbox"/> A7260 Premises Liability (e.g., slip and fall) <input type="checkbox"/> A7290 Intentional Bodily Injury/Property Damage/Wrongful Death (e.g., assault, vandalism, etc.) <input type="checkbox"/> A7270 Intentional Infliction of Emotional Distress <input type="checkbox"/> A7280 Other Personal Injury/Property Damage/Wrongful Death	1, 4 1, 4 1, 2 1, 4



SHORT TITLE:

Jovel v. I-Health, Inc.

CASE NUMBER

Case Cover Sheet Addendum		Type of Action (Check only one)	Applicable Rules of Civil Procedure
Non-Personal Injury/Property Damage/ Wrongful Death Tort	Business Tort (07)	<input checked="" type="checkbox"/> A6029 Other Commercial/Business Tort (not fraud/breach of contract)	1., 3.
	Civil Rights (08)	<input type="checkbox"/> A6005 Civil Rights/Discrimination	1., 2., 3.
	Defamation (13)	<input type="checkbox"/> A6010 Defamation (slander/libel)	1., 2., 3.
	Fraud (16)	<input type="checkbox"/> A6013 Fraud (no contract)	1., 2., 3.
	Professional Negligence (25)	<input type="checkbox"/> A6017 Legal Malpractice <input type="checkbox"/> A6050 Other Professional Malpractice (not medical or legal)	1., 2., 3. 1., 2., 3.
	Other (35)	<input type="checkbox"/> A6025 Other Non-Personal Injury/Property Damage tort	2., 3.
	Employment	Wrongful Termination (36)	<input type="checkbox"/> A6037 Wrongful Termination
Other Employment (15)		<input type="checkbox"/> A6024 Other Employment Complaint Case <input type="checkbox"/> A6109 Labor Commissioner Appeals	1., 2., 3. 10.
Contract	Breach of Contract/ Warranty (06) (not insurance)	<input type="checkbox"/> A6004 Breach of Rental/Lease Contract (not unlawful detainer or wrongful eviction) <input type="checkbox"/> A6008 Contract/Warranty Breach -Seller Plaintiff (no fraud/negligence) <input type="checkbox"/> A6019 Negligent Breach of Contract/Warranty (no fraud) <input type="checkbox"/> A6028 Other Breach of Contract/Warranty (not fraud or negligence)	2., 5. 2., 5. 1., 2., 5. 1., 2., 5.
	Collections (09)	<input type="checkbox"/> A6002 Collections Case-Seller Plaintiff <input type="checkbox"/> A6012 Other Promissory Note/Collections Case	2., 5., 6. 2., 5.
	Insurance Coverage (18)	<input type="checkbox"/> A6015 Insurance Coverage (not complex)	1., 2., 5., 8.
	Other Contract (37)	<input type="checkbox"/> A6009 Contractual Fraud <input type="checkbox"/> A6031 Tortious Interference <input type="checkbox"/> A6027 Other Contract Dispute(not breach/insurance/fraud/negligence)	1., 2., 3., 5. 1., 2., 3., 5. 1., 2., 3., 8.
	Eminent Domain/Inverse Condemnation (14)	<input type="checkbox"/> A7300 Eminent Domain/Condemnation Number of parcels _____	2.
Real Property	Wrongful Eviction (33)	<input type="checkbox"/> A6023 Wrongful Eviction Case	2., 6.
	Other Real Property (26)	<input type="checkbox"/> A6018 Mortgage Foreclosure <input type="checkbox"/> A6032 Quiet Title <input type="checkbox"/> A6060 Other Real Property (not eminent domain, landlord/tenant, foreclosure)	2., 6. 2., 6. 2., 6.
	Unlawful Detainer	<input type="checkbox"/> A6021 Unlawful Detainer-Commercial (not drugs or wrongful eviction)	2., 6.
Unlawful Detainer	Unlawful Detainer-Residential (32)	<input type="checkbox"/> A6020 Unlawful Detainer-Residential (not drugs or wrongful eviction)	2., 6.
	Unlawful Detainer-Post-Foreclosure (34)	<input type="checkbox"/> A6020F Unlawful Detainer-Post-Foreclosure	2., 6.
	Unlawful Detainer-Drugs (38)	<input type="checkbox"/> A6022 Unlawful Detainer-Drugs	2., 6.



SHORT TITLE: <b>Jovel v. I-Health, Inc.</b>	CASE NUMBER
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	A Civil Case Cover Sheet Category No.	B Type of Action (Check only one)	C Applicable Reasons (See Step 3 Above)
Judicial Review	Asset Forfeiture (05)	<input type="checkbox"/> A6108 Asset Forfeiture Case	2., 6.
	Petition re Arbitration (11)	<input type="checkbox"/> A6115 Petition to Compel/Confirm/Vacate Arbitration	2., 5.
	Writ of Mandate (02)	<input type="checkbox"/> A6151 Writ - Administrative Mandamus <input type="checkbox"/> A6152 Writ - Mandamus on Limited Court Case Matter <input type="checkbox"/> A6153 Writ - Other Limited Court Case Review	2., 8. 2. 2.
	Other Judicial Review (39)	<input type="checkbox"/> A6150 Other Writ /Judicial Review	2., 8.
Provisionally Complex Litigation	Antitrust/Trade Regulation (03)	<input type="checkbox"/> A6003 Antitrust/Trade Regulation	1., 2., 8.
	Construction Defect (10)	<input type="checkbox"/> A6007 Construction Defect	1., 2., 3.
	Claims Involving Mass Tort (40)	<input type="checkbox"/> A6006 Claims Involving Mass Tort	1., 2., 8.
	Securities Litigation (28)	<input type="checkbox"/> A6035 Securities Litigation Case	1., 2., 8.
	Toxic Tort Environmental (30)	<input type="checkbox"/> A6036 Toxic Tort/Environmental	1., 2., 3., 8.
	Insurance Coverage Claims from Complex Case (41)	<input type="checkbox"/> A6014 Insurance Coverage/Subrogation (complex case only)	1., 2., 5., 8.
Enforcement of Judgment	Enforcement of Judgment (20)	<input type="checkbox"/> A6141 Sister State Judgment <input type="checkbox"/> A6160 Abstract of Judgment <input type="checkbox"/> A6107 Confession of Judgment (non-domestic relations) <input type="checkbox"/> A6140 Administrative Agency Award (not unpaid taxes) <input type="checkbox"/> A6114 Petition/Certificate for Entry of Judgment on Unpaid Tax <input type="checkbox"/> A6112 Other Enforcement of Judgment Case	2., 9. 2., 6. 2., 9. 2., 8. 2., 8. 2., 8., 9.
	RICO (27)	<input type="checkbox"/> A6033 Racketeering (RICO) Case	1., 2., 8.
Miscellaneous Civil Complaints	Other Complaints (Not Specified Above) (42)	<input type="checkbox"/> A6030 Declaratory Relief Only <input type="checkbox"/> A6040 Injunctive Relief Only (not domestic/harassment) <input type="checkbox"/> A6011 Other Commercial Complaint Case (non-tort/non-complex) <input type="checkbox"/> A6000 Other Civil Complaint (non-tort/non-complex)	1., 2., 8. 2., 8. 1., 2., 8. 1., 2., 8.
	Partnership Corporation Governance (21)	<input type="checkbox"/> A6113 Partnership and Corporate Governance Case	2., 8.
Miscellaneous Civil Petitions	Other Petitions (Not Specified Above) (43)	<input type="checkbox"/> A6121 Civil Harassment <input type="checkbox"/> A6123 Workplace Harassment <input type="checkbox"/> A6124 Elder/Dependent Adult Abuse Case <input type="checkbox"/> A6190 Election Contest <input type="checkbox"/> A6110 Petition for Change of Name <input type="checkbox"/> A6170 Petition for Relief from Late Claim Law <input type="checkbox"/> A6100 Other Civil Petition	2., 3., 9. 2., 3., 9. 2., 3., 9. 2. 2., 7. 2., 3., 4., 8. 2., 9.

SHORT TITLE: <b>Jovel v. I-Health, Inc.</b>	CASE NUMBER
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**Item III. Statement of Location:** Enter the address of the accident, party's residence or place of business, performance, or other circumstance indicated in Item II., Step 3 on Page 1, as the proper reason for filing in the court location you selected.

<b>REASON:</b> Check the appropriate boxes for the numbers shown under Column C for the type of action that you have selected for this case.  <input checked="" type="checkbox"/> 1. <input type="checkbox"/> 2. <input type="checkbox"/> 3. <input type="checkbox"/> 4. <input type="checkbox"/> 5. <input type="checkbox"/> 6. <input type="checkbox"/> 7. <input type="checkbox"/> 8. <input type="checkbox"/> 9. <input type="checkbox"/> 10.			<b>ADDRESS:</b>  
<b>CITY:</b> Los Angeles	<b>STATE:</b>	<b>ZIP CODE:</b>	

**Item IV. Declaration of Assignment:** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that the above-entitled matter is properly filed for assignment to the Stanley Mosk courthouse in the Central District of the Superior Court of California, County of Los Angeles [Code Civ. Proc., § 392 et seq., and Local Rule 2.0, subds. (b), (c) and (d)].

Dated: March 16, 2012

 #217877  
(SIGNATURE OF ATTORNEY/FILING PARTY)

**PLEASE HAVE THE FOLLOWING ITEMS COMPLETED AND READY TO BE FILED IN ORDER TO PROPERLY COMMENCE YOUR NEW COURT CASE:**

1. Original Complaint or Petition.
2. If filing a Complaint, a completed Summons form for issuance by the Clerk.
3. Civil Case Cover Sheet, Judicial Council form CM-010.
4. Civil Case Cover Sheet Addendum and Statement of Location form, LACIV 109, LASC Approved 03-04 (Rev. 03/11).
5. Payment in full of the filing fee, unless fees have been waived.
6. A signed order appointing the Guardian ad Litem, Judicial Council form CIV-010, if the plaintiff or petitioner is a minor under 18 years of age will be required by Court in order to issue a summons.
7. Additional copies of documents to be conformed by the Clerk. Copies of the cover sheet and this addendum must be served along with the summons and complaint, or other initiating pleading in the case.

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES**  
**NOTICE OF CASE ASSIGNMENT - UNLIMITED CIVIL CASE**  
Case Number \_\_\_\_\_

2481048

**THIS FORM IS TO BE SERVED WITH THE SUMMONS AND COMPLAINT**  
Your case is assigned for all purposes to the judicial officer indicated below (Local Rule 7-2(a)). There is additional information on the reverse side of this form.

ASSIGNED JUDGE	DEPT	ROOM	ASSIGNED JUDGE	DEPT	ROOM
Hon. Carolyn B. Kuhl	1	534	Hon. Holly E. Kendig	42	416
Hon. J. Stephen Czulager	3	224	Hon. Mel Red Reana	45	529
Hon. Luis A. Lavin	13	630	Hon. Debra Katz Weintraub	47	507
Hon. Terry A. Green	14	300	Hon. Elizabeth Allen White	48	506
Hon. Richard Frida	15	307	Hon. Deidre Hill	49	509
Hon. Rita Miller	16	306	Hon. John L. Segal	50	508
Hon. Richard E. Rico	17	309	Hon. Abraham Khan	51	511
Hon. Rex Hoeseama	19	311	Hon. Susan Bryant-Denson	52	510
Hon. Kevin C. Brazile	20	310	Hon. Steven J. Kleinfeld	53	513
Hon. Michael P. Linfield	10	313	Hon. Ernest M. Hirschig	54	512
Hon. Robert L. Hess	24	314	Hon. Malcolm H. Mackoy	55	515
Hon. Mary Ann Murphy	25	317	Hon. Michael Johnson	56	514
Hon. James R. Dunn	26	316	Hon. Ralph W. Dan	57	517
Hon. Yvette M. Palenzuela	28	318	Hon. Rolf M. Trou	58	516
Hon. Barbara Schepers	30	400	Hon. David L. Minning	61	632
Hon. Alan S. Rosenfield	31	407	Hon. Michael L. Stern	62	600
Hon. Mary H. Strobel	32	406	Hon. Fredrick C. Shaller	46	601
Hon. Charles F. Palmer	33	409	Hon. Mark Mooney	68	617
Hon. Amy D. Hogue	34	408	Hon. Ramona See	69	621
Hon. Daniel Buckley	35	411	Hon. Suzanne G. Bruguera	71	729
Hon. Gregory Alarcon	36	410	Hon. Ruth Ann Kwan	72	731
Hon. Joanne O'Donnell	37	413	Hon. Teresa Sanchez-Gordon	74	735
Hon. Maureen Duffy-Lewis	38	412	Hon. William F. Fahy	78	730
Hon. Michael C. Solner	39	415	Hon. Emilie H. Elias	324	CCW
Hon. Michelle R. Rosenblatt	40	414	Hon. Elhan M. Berle*	323	CCW
Hon. Ronald M. Sobigian	41	417	other		

**\*Class Actions**

All class actions are initially assigned to Judge Elhan M. Berle in Department 323 of the Central Civil West Courthouse (808 S. Commonwealth Ave., Los Angeles 90005). This assignment is for the purpose of assessing whether or not the case is complex within the meaning of California Rules of Court, rule 2.402. Depending on the outcome of that assessment, the class action case may be reassigned to one of the judges of the Complex Litigation Program or reassigned randomly to a court in the Central District.

Given to the Plaintiff/Cross-Complainant/Attorney of Record on \_\_\_\_\_ **JOHN A. CLARKE**, Executive Officer/Clerk  
By \_\_\_\_\_, Deputy Clerk





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24 Attorneys for Plaintiff

25  
26 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
27 COUNTY OF LOS ANGELES

28 AMY JOVEL, On Behalf of Herself and  
All Others Similarly Situated,

Plaintiff,

v.

I-HEALTH, INC., a Delaware  
Corporation

Defendant.

Case No.: BC481048

FIRST AMENDED CLASS ACTION  
COMPLAINT FOR:

1. VIOLATION OF THE UNFAIR  
COMPETITION LAW, Business and  
Professions Code §17200 *et seq.*;
2. VIOLATION OF THE CONSUMERS  
LEGAL REMEDIES ACT,  
Civil Code §1750 *et seq.*; and
3. BREACH OF EXPRESS  
WARRANTY.

DEMAND FOR JURY TRIAL

CONFORMED COPY  
ORIGINAL FILED  
Superior Court of California  
County of Los Angeles

APR 16 2012

John A. Clarke, Executive Officer/Clerk  
By: Tanaya Lewis, Deputy



1 Plaintiff Amy Jovel brings this action on behalf of herself and all others similarly  
2 situated against Defendant I-Health, Inc. and states:

### 3 NATURE OF ACTION

4 1. Defendant manufactures, markets, sells and distributes BrainStrong, a line  
5 of four dietary supplements fortified with highly processed fermented algae.<sup>1</sup> Through an  
6 extensive, widespread, comprehensive and uniform nationwide marketing campaign,  
7 Defendant claims that taking its BrainStrong products will support brain health. On each  
8 and every BrainStrong Toddler and Kids package, where it cannot be missed by  
9 consumers, Defendant prominently states that BrainStrong "Supports brain development  
10 and function". Similarly, on each and every BrainStrong Adult package, Defendant  
11 represents that the product is "clinically shown to improve memory", "naturally supports  
12 mental clarity" and "helps protect against normal cognitive decline" (hereinafter "the  
13 brain health representations"). The brain health representations appear prominently on the  
14 front of each and every BrainStrong box.

15 2. In truth, the BrainStrong products do not support brain health in children or  
16 adults. Clinical cause and effect studies have consistently found no causative link  
17 between DHA algal oil supplementation and brain health. Defendant's representations are  
18 false, misleading, and reasonably likely to deceive the public.

19 3. Defendant has employed numerous methods to convey its uniform,  
20 deceptive brain health representations to consumers, starting with the Products'  
21 "BrainStrong" name, its website and in its online and print promotional materials and,  
22 importantly, prominently on the front and center of the Products' packaging where the  
23 brain health representations cannot be missed by consumers. The only reason a consumer  
24 would purchase BrainStrong is to obtain the advertised brain health benefits, which are the  
25

26 <sup>1</sup> These products include: (1) BrainStrong Prenatal; (2) BrainStrong Toddler; (3) BrainStrong  
27 Kids; and (4) BrainStrong Adults. This lawsuit concerns only three of the products --  
28 BrainStrong Toddler, BrainStrong Kids and BrainStrong Adults (collectively "BrainStrong" or  
"the Products").

1 only represented benefits and which the Products do not provide.

2 4. As a result of Defendant's deceptive brain health representations, consumers  
3 – including Plaintiff and members of the proposed Class – have purchased Products that  
4 do not perform as advertised.

5 5. Plaintiff brings this action on behalf of herself and other similarly situated  
6 consumers in California who have purchased BrainStrong to halt the dissemination of this  
7 false, misleading and deceptive advertising message, correct the false and misleading  
8 perception it has created in the minds of consumers, and obtain redress for those who have  
9 purchased the Products. Plaintiff alleges violations of the Consumers Legal Remedies  
10 Act, the Unfair Competition Law, and Breach of Express Warranty created by  
11 Defendant's advertising, including false labeling.

#### 12 JURISDICTION AND VENUE

13 6. This Court has jurisdiction over Defendant and the claims set forth below  
14 pursuant to Code of Civil Procedure §410.10 and the California Constitution, Article VI  
15 §10, because this case is a cause not given by statute to other trial courts.

16 7. This Court has jurisdiction over Defendant because it is a corporation that  
17 does substantial business in California, including Los Angeles County. Defendant  
18 promotes, markets, distributes and sells BrainStrong in Los Angeles County, causing  
19 Defendant to incur both obligations and liabilities in Los Angeles County.

20 8. The amount in controversy does not exceed \$74,999.00 with respect to  
21 Plaintiff's claim and the Class members' claims as a whole do not exceed the  
22 jurisdictional limit of \$5,000,000 for purposes of establishing jurisdiction diversity  
23 jurisdiction pursuant to the Class Action Fairness Act. More than two thirds of the  
24 members of the Class currently reside in California. The amount in controversy  
25 requirement exceeds the jurisdiction minimum of this Court.

26 9. Venue is proper in Los Angeles County because Defendant systemically and  
27 continuously transacts business in Los Angeles County California and the transactions  
28

1 with Plaintiff took place in Los Angeles County, California

## 2 PARTIES

3 10. Plaintiff Amy Jovel resides in Los Angeles County, California. In or around  
4 December 2011, Plaintiff Jovel purchased one box of BrainStrong Kids from a Wal-Mart  
5 in Los Angeles, California. Prior to purchasing BrainStrong Kids, Plaintiff Jovel was  
6 exposed to and saw Defendant's advertisements claiming that the Products support brain  
7 health in adults and children. Prior to purchasing the Product, Plaintiff also read the  
8 BrainStrong Kids label reaffirming the claims she saw in the advertisements. Relying on  
9 these claims, Plaintiff Jovel purchased BrainStrong Kids, believing the Product supported  
10 brain health. She paid approximately \$15 for the Product. Plaintiff gave the Product to  
11 her daughter as directed. The BrainStrong Kids product Plaintiff purchased does not  
12 support brain health as represented. As a result, Plaintiff suffered injury in fact and lost  
13 money. Had Plaintiff known the truth about Defendant's misrepresentations and  
14 omissions, she would not have purchased BrainStrong Kids.

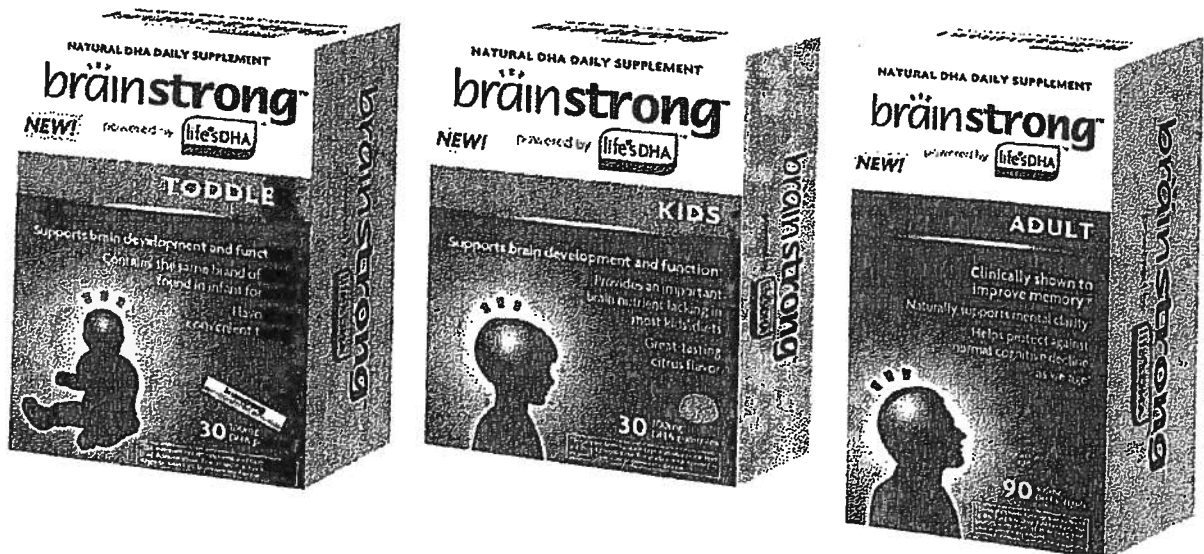
15 11. Defendant I-Health, Inc ("I-Health") is a corporation organized and existing  
16 under the laws of the state of Delaware. I-Health's headquarters is at 55 Sebethe Drive,  
17 Suite 102, Cromwell, Connecticut 06416. Defendant I-Health manufactured, advertised,  
18 marketed, distributed and sold the BrainStrong products throughout California.

## 19 FACTUAL ALLEGATIONS

### 20 *The BrainStrong Products*

21 12. Since April 2011, Defendant has manufactured, distributed, marketed and  
22 sold its BrainStrong products throughout California. This lawsuit concerns three of those  
23 products: (1) BrainStrong Toddler; (2) BrainStrong Kids; (3) and BrainStrong Adults.

24 13. Defendant's BrainStrong products are sold in virtually every major food,  
25 drug, and mass retail outlet in the country. The Products retail for approximately \$15-  
26 \$30. The following are screen shots of the Products:



14. Since the Products' launch, Defendant has consistently conveyed the message to consumers throughout California that its BrainStrong products provide an essential daily supplement fortified with DHA algal oil that "supports brain health and function" in children and adults. They do not. Defendant's brain health representations are false, misleading and deceptive.

15. All three BrainStrong products contain "life's DHA". DHA is a long-chain omega-3 fatty acid typically found in cold water fish. The DHA in Defendant's BrainStrong products is not derived from fish oil. Instead, the DHA oil in Defendant's products is an immature short-chain omega-3 fatty acid made from an extract of mutated and fermented algae. Contrary to Defendant's representations made on each and every Product package, DHA algal oil does not support brain health.

16. There are no competent and reliable scientific studies that DHA algal oil supplementation supports brain health. The one and only "reference" appearing on any of the Products is on the BrainStrong Adult label, purportedly supporting Defendant's "clinically shown to improve memory" representation. But, no identifying information is included with the "reference" to enable consumers to locate and review the "reference". The "reference" is not competent and reliable scientific support for Defendant's brain



1 health representation.

2 17. In truth, clinical cause and effect studies establish that Defendant's brain  
3 health representations are deceptive. For example, in Kirby, A., et. al., *A Double-Blind,*  
4 *Placebo-Controlled Study Investigating the Effects of Omega-3 Supplementation in*  
5 *Children Aged 8-10 Years from a Mainstream School Population*, 31(3) Research in  
6 Developmental Disabilities 718-30 (2010), the study authors examined the effects of fish  
7 oil DHA supplementation on 450 students (ages 8-10 years old) for 16 weeks. *Id.* at 720.  
8 The study authors found that despite the wide range of cognitive and behavior outcomes  
9 used, DHA supplementation resulted in no significant differences in cognitive results:  
10 "very few significant differences between the supplemented and placebo group on the  
11 learning and performance measures used." *Id.* at 729.

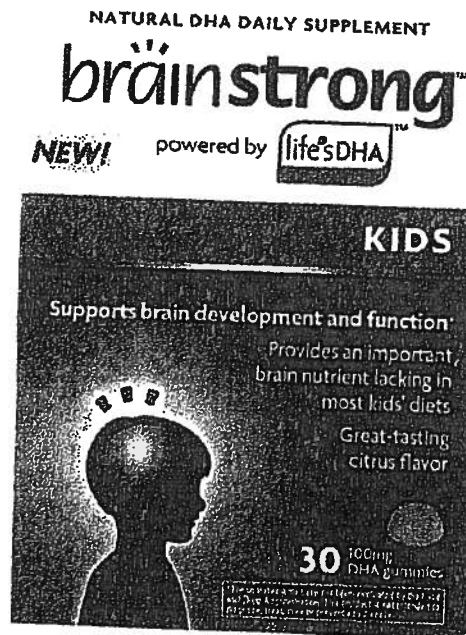
12 18. Similarly, a 2008 study funded by Martek Biosciences, the manufacturers of  
13 the Life's DHA in the Products, concluded that there was no statistically significant  
14 difference between the DHA and placebo group in cognitive function. See Ryan, A., et  
15 al., *Assessing the Effect of Docosahexaemoic Acid on Cognitive Functions in Healthy*  
16 *Preschool Children*, 47(4) Clin. Pediatr. 355-62 (2008) (the Ryan Study).<sup>2</sup> See also  
17 Eilander, A., et al., *Effects of n-3 long chain polyunsaturated fatty acid supplementation*  
18 *on visual and cognitive development throughout childhood: a review of human studies*,  
19 76(4) J. Prostaglandins, Leukotrienes and Essential Fatty Acids 189-203 (Apr. 2007)  
20 ("Evidence for benefits of n-3 LCPUFA on cognitive development in healthy children  
21 older than 2 years of age is too limited to allow a clear conclusion.").

22 19. These and other competent and reliable scientific studies have found no  
23 cause and effect relationship between intake of dietary supplements with DHA algal oil  
24 and cognitive development. Defendant's brain health representations are false and  
25 misleading and reasonably likely to deceive the average consumer.

26  
27 <sup>2</sup> This study examined 175 4-year old children who received either 400 mg/d of DHA derived  
28 from the microalgae *Schizochytrium* spp or a placebo in capsules for 4 months.



20. Despite the lack of any competent and reliable scientific evidence that DHA algal oil supplementation supports brain health and the overwhelming evidence that it does not, each and every Product package repeatedly emphasizes that the BrainStrong products support brain health. Each and every consumer who purchases the Products is exposed to these deceptive brain health representations, which appear prominently and conspicuously on the front of the Products' packaging:



21. And, the entire backside panel is dedicated to promoting the DHA algal oil in Defendant's Products and its purported ability to support brain health:



1           25. Nonetheless, Defendant conveyed and continues to convey one uniform  
2 message through its advertising campaign: BrainStrong supports brain health in children  
3 and adults.

4           26. Plaintiff and Class members have been and will continue to be deceived or  
5 misled by Defendant's deceptive brain health representations. Plaintiff purchased and  
6 consumed the Product during the relevant time period and in doing so, read and  
7 considered the Product labels and based her decision to buy the Product on the brain  
8 health representations. Defendant's brain health representations and omissions were a  
9 material factor in influencing Plaintiff's decision to purchase and give her daughter the  
10 Product. Plaintiff would not have purchased the Product had she known that Defendant's  
11 claims were false and misleading, that Defendant did not possess competent and reliable  
12 scientific evidence to support its brain health representations, and that clinical cause-and-  
13 effect studies have found no causative link between DHA algal oil supplementation and  
14 brain health.

15           27. As a result, Plaintiff and the Class members have been damaged in their  
16 purchases of these Products and have been deceived into purchasing Products that they  
17 believed, based on Defendant's representations, supported brain health, when, in fact, they  
18 do not.

19           28. Defendant, by contrast, reaped enormous profits from its false marketing  
20 and sale of these products.

#### 21                           **CLASS DEFINITION AND ALLEGATIONS**

22           29. Plaintiff brings this action on behalf of herself and all similarly situated  
23 consumers pursuant to C.C.P. §382 and Cal. Civ. Code §1781. The Class of persons  
24 whom plaintiff seeks to represent is defined as:

25                           All California consumers who purchased BrainStrong Toddler,  
26 BrainStrong Kids and/or BrainStrong Adults.

1 Excluded from the Class are Defendant and its officers, directors  
2 and employees and those who purchased BrainStrong for the  
purpose of resale.

3 30. Plaintiff and the members of the Class are so numerous and geographically  
4 dispersed throughout the State of California that joinder of all members individually is  
5 impracticable. While the exact number and identities of the Class members are unknown  
6 at this time, such information can be ascertained through appropriate investigation and  
7 discovery.

8 31. The disposition of Plaintiff's and proposed Class members' claims in a class  
9 action will provide substantial benefits to both the parties and the Court.

10 32. The proposed Class is ascertainable and there is a well-defined community  
11 of interest in the questions of law or fact alleged herein since the rights of each proposed  
12 Class member were infringed or violated in a similar fashion based upon Defendant's  
13 uniform warranties and misrepresentations and material omissions about its BrainStrong  
14 products.

15 33. The questions of law and fact common to the proposed Class predominate  
16 over questions that may affect particular proposed Class members. Common questions of  
17 fact and law include, but are not limited to, the following:

18 (a) whether the claims discussed above are true, or are misleading, or  
19 reasonably likely to deceive;

20 (b) whether Defendant's alleged conduct violates public policy;

21 (c) whether the alleged conduct constitutes violations of the laws  
22 asserted;

23 (d) whether Defendant engaged in false or misleading advertising;

24 (e) whether Plaintiff and Class members have sustained monetary loss  
25 and the proper measure of that loss;

26 (f) whether Plaintiff and Class members are entitled to restitution and  
27 disgorgement of damages; and  
28

1 (g) whether Plaintiff and Class members are entitled to declaratory and  
2 injunctive relief.

3 34. Judicial determination of the common legal and factual issues essential to  
4 this case would be far more efficient and economical as a class action than in piecemeal  
5 individual determinations.

6 35. Plaintiff's claims are typical of the claims of the members of the Class  
7 because, *inter alia*, all Class members were injured through the uniform misconduct  
8 described above, and were subject to Defendant's deceptive brain health representations,  
9 including the deceptive brain health representations that accompanied each and every box  
10 of BrainStrong. Plaintiff is advancing the same claims and legal theories on behalf of  
11 herself and all members of the Class.

12 36. Plaintiff is willing and prepared to serve the Court and the proposed Class in  
13 a representative capacity with all of the obligations and duties material thereto. Plaintiff  
14 will fairly and adequately protect the interests of the Class and has no interests adverse to  
15 or which directly and irrevocably conflict with the interests of other members of the Class.

16 37. The self interests of the Plaintiff are co-extensive with, and not antagonistic  
17 to, those of the absent Class members. Plaintiff will undertake to represent and protect the  
18 interests of the absent Class members.

19 38. Plaintiff has engaged the services of counsel indicated below. Counsel are  
20 experienced in complex class action litigation, will adequately prosecute this action, and  
21 will assert and protect the rights of, and otherwise will represent the plaintiff and absent  
22 Class members.

23 39. Plaintiff seeks preliminary and permanent injunctive and equitable relief on  
24 behalf of the entire Class, on grounds generally applicable to the entire Class, to enjoin  
25 and prevent Defendant from engaging in the acts described, and requiring Defendant to  
26 provide full restitution to Plaintiff and Class members.



1           40. Unless a Class is certified, Defendant will retain monies received as a result  
2 of its conduct that were taken from Plaintiff and Class members. Unless a Class-wide  
3 injunction is issued, Defendant will continue to commit the violations alleged, and the  
4 members of the Class and the general public will continue to be deceived.

5           41. Defendant has acted and refused to act on grounds generally applicable to  
6 the Class, making appropriate final injunctive relief with respect to the Class as a whole.

7  
8                                   **COUNT I**

9                           **Violation of Business & Professions Code §17200, *et seq.***

10           42. Plaintiff repeats and re-alleges the allegations contained in the paragraphs  
above, as if fully set forth herein.

11           43. Plaintiff brings this claim individually and on behalf of the Class.

12           44. As alleged herein, Plaintiff has suffered injury in fact and lost money or  
13 property as a result of Defendant's conduct because she purchased the Product in reliance  
14 on Defendant's brain health representations, but did not receive a product that supports  
15 brain health.

16           45. The Unfair Competition Law, Business & Professions Code §17200, *et seq.*  
17 ("UCL"), prohibits any "unlawful," "fraudulent" or "unfair" business act or practice and  
18 any false or misleading advertising. In the course of conducting business, Defendant  
19 committed unlawful business practices by, *inter alia*, making the representations (which  
20 also constitute advertising within the meaning of §17200) and omissions of material facts,  
21 as set forth more fully herein, and violating Civil Code §§1572, 1573, 1709, 1711, 1770  
22 and Business & Professions Code §§17200, *et seq.*, 17500, *et seq.*, and the common law.

23           46. Plaintiff and the Class reserve the right to allege other violations of law,  
24 which constitute other unlawful business acts or practices. Such conduct is ongoing and  
25 continues to this date.

26           47. Defendant's actions also constitute "unfair" business acts or practices  
27 because, as alleged above, *inter alia*, Defendant engaged in false advertising,  
28

1 misrepresented and omitted material facts regarding its BrainStrong products, and thereby  
2 offended an established public policy, and engaged in immoral, unethical, oppressive, and  
3 unscrupulous activities that are substantially injurious to consumers.

4 48. As stated in this Complaint, Plaintiff alleges violations of consumer  
5 protection, unfair competition and truth in advertising laws, resulting in harm to  
6 consumers. Defendant's acts and omissions also violate and offend the public policy  
7 against engaging in false and misleading advertising, unfair competition and deceptive  
8 conduct towards consumers. This conduct constitutes violations of the unfair prong of  
9 Business & Professions Code §17200, *et seq.*

10 49. There were reasonably available alternatives to further Defendant's  
11 legitimate business interests, other than the conduct described herein.

12 50. Business & Professions Code §17200, *et seq.*, also prohibits any "fraudulent  
13 business act or practice."

14 51. Defendant's actions, claims, nondisclosures and misleading statements, as  
15 more fully set forth above, were also false, misleading and/or likely to deceive the  
16 consuming public within the meaning of Business & Professions Code §17200, *et seq.*

17 52. Plaintiff and the other Class members have suffered injury in fact and lost  
18 money as a result of these unlawful, unfair, and fraudulent practices.

19 53. As a result of its deception, Defendant has been able to reap unjust revenue  
20 and profit.

21 54. Unless restrained and enjoined, Defendant will continue to engage in the  
22 above-described conduct. Accordingly, injunctive relief is appropriate.

23 55. Plaintiff, on behalf of herself, all others similarly situated, and the general  
24 public, seeks restitution of all money obtained from Plaintiff and the members of the Class  
25 collected as a result of unfair competition, an injunction prohibiting Defendant from  
26 continuing such practices, corrective advertising and all other relief this Court deems  
27 appropriate, consistent with Business & Professions Code §17203.

**COUNT II**  
**Violations of the Consumers Legal Remedies Act –**  
**Civil Code §1750 *et seq.***

56. Plaintiff repeats and re-alleges the allegations contained in the paragraphs above, as if fully set forth herein.

57. Plaintiff brings this claim individually and on behalf of the Class.

58. This cause of action is brought pursuant to the Consumers Legal Remedies Act, California Civil Code §1750, *et seq.* (the “Act”). Plaintiff is a consumer as defined by California Civil Code §1761(d). The BrainStrong products are “goods” within the meaning of the Act.

59. Defendant violated and continues to violate the Act by engaging in the following practices proscribed by California Civil Code §1770(a) in transactions with Plaintiff and the Class which were intended to result in, and did result in, the sale of the BrainStrong products:

(5) Representing that [the BrainStrong products have] . . . approval, characteristics, . . . uses [and] benefits . . . which [they do] not have . . . .

\* \* \*

(7) Representing that [the BrainStrong products are] of a particular standard, quality or grade . . . if [they are] of another.

\* \* \*

(9) Advertising goods . . . with intent not to sell them as advertised.

\* \* \*

(16) Representing that [the BrainStrong products have] been supplied in accordance with a previous representation when [they have] not.

60. Defendant violated the Act by representing and failing to disclose material facts on the BrainStrong labels and associated advertising, as described above, when it

1 knew, or should have known, that the representations were false and misleading and that  
2 the omissions were of material facts it was obligated to disclose.

3 61. Pursuant to California Civil Code §1782(d), Plaintiff and the Class seek a  
4 Court order enjoining the above-described wrongful acts and practices of Defendant and  
5 for restitution and disgorgement.

6 62. Pursuant to §1782 of the Act, by letter dated March 16, 2012, Plaintiff  
7 notified Defendant in writing by certified mail of the particular violations of §1770 of the  
8 Act and demanded that Defendant rectify the problems associated with the actions  
9 detailed above and give notice to all affected consumers of Defendant's intent to so act.

10 63. Defendant failed to rectify or agree to rectify the problems associated with  
11 the actions detailed above and give notice to all affected consumers within 30 days of the  
12 date of written notice pursuant to §1782 of the Act. Therefore, Plaintiff further seeks  
13 actual, punitive and statutory damages.

14 64. Defendant's conduct is fraudulent, wanton and malicious.

15 **COUNT III**  
16 **Breach of Express Warranty**

17 65. Plaintiff repeats and re-alleges the allegations contained in the paragraphs  
18 above, as if fully set forth herein.

19 66. Plaintiff brings this claim individually and on behalf of the Class.

20 67. Defendant expressly warranted on each and every box of BrainStrong that  
21 the Products "support brain development and function" in children and adults alike. The  
22 brain health representations made by Defendant are affirmations of fact that became part  
23 of the basis of the bargain and created an express warranty that the goods would conform  
24 to the stated promise. Plaintiff placed importance on Defendant's brain health  
25 representations.

26 68. All conditions precedent to Defendant's liability under this contract have  
27 been performed by Plaintiff and the Class.



1           69. Defendant breached the terms of this contract, including the express  
2 warranties, with Plaintiff and the Class by not providing a Product that would support  
3 brain health as represented.

4           70. As a result of Defendant's breach of its contract, Plaintiff and the Class have  
5 been damaged in the amount of the price of the Products they purchased.

6                                   **PRAYER FOR RELIEF**

7       Wherefore, Plaintiff prays for a judgment:

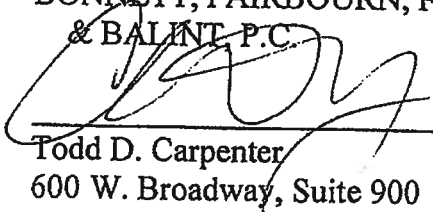
- 8           A. Certifying the Class as requested herein;  
9           B. Awarding Plaintiff and the proposed Class members damages;  
10          C. Awarding restitution and disgorgement of Defendant's revenues to Plaintiff  
11 and the proposed Class members;  
12          D. Awarding injunctive relief as permitted by law or equity, including  
13 enjoining Defendant from continuing the unlawful practices as set forth herein;  
14          E. Awarding statutory and punitive damages, as appropriate.  
15          F. Ordering Defendant to engage in a corrective advertising campaign;  
16          G. Awarding attorneys' fees and costs; and  
17          H. Providing such further relief as may be just and proper.

18                                   **DEMAND FOR JURY TRIAL**

19       Plaintiff hereby demands a trial of her claims by jury to the extent authorized by  
20 law.

21       Dated: April 16, 2012

22                                   BONNETT, FAIRBOURN, FRIEDMAN  
23                                   & BALINT P.C.

24                                     
25                                   Todd D. Carpenter  
26                                   600 W. Broadway, Suite 900  
27                                   San Diego, California 92101  
28                                   tcarpenter@bffb.com  
                                  Telephone: (619) 756-6978

1 BONNETT, FAIRBOURN, FRIEDMAN  
2 & BALINT, P.C.

3 Patricia N. Syverson  
4 2901 N. Central Ave., Suite 1000  
5 Phoenix, AZ 85012  
6 psyverson@bffb.com  
7 Telephone: (602) 274-1100

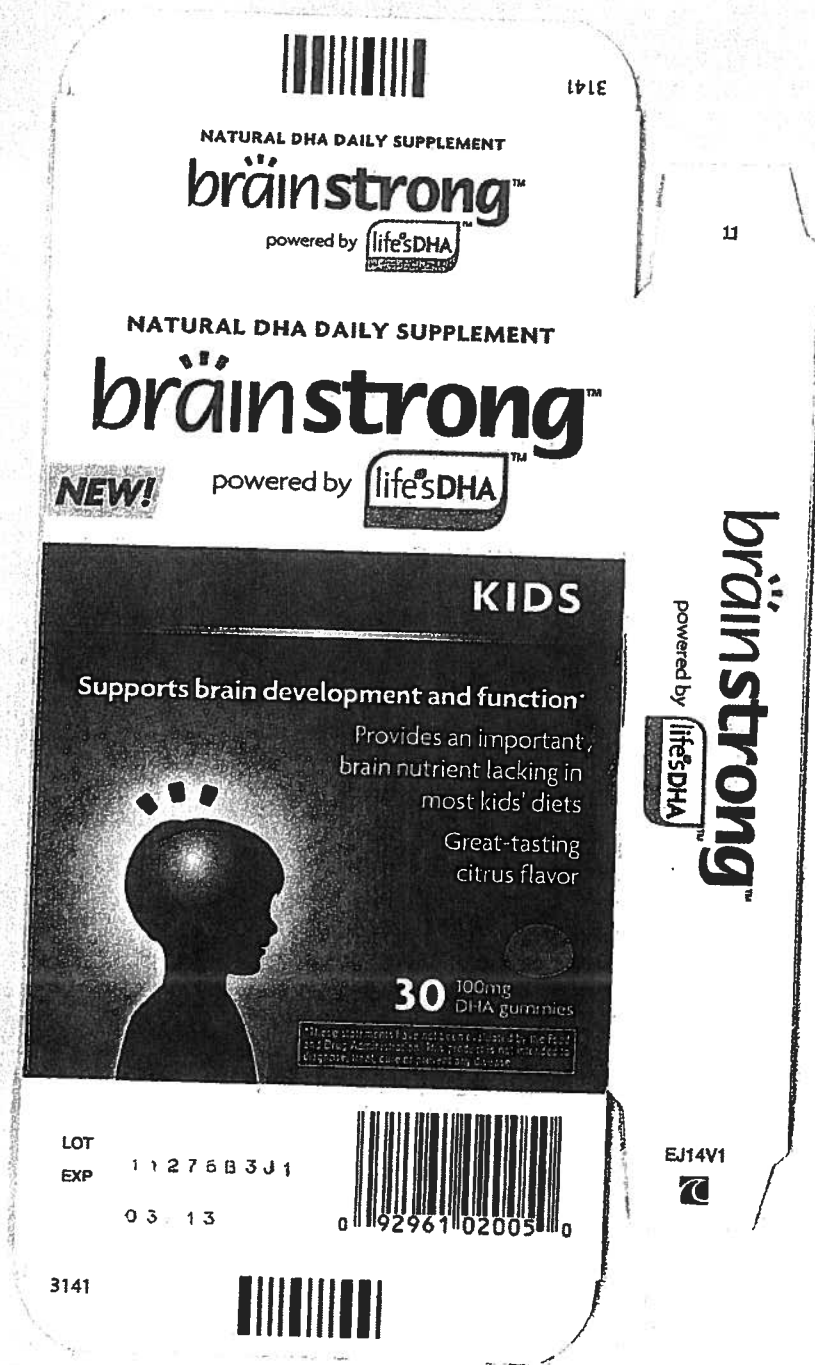
8 LEVIN, FISHBEIN, SEDRAN & BERMAN  
9 Stewart Weltman, of Counsel  
10 122 S. Michigan Avenue, Suite 1850  
11 Chicago, Illinois 60603  
12 Telephone: (312) 427-3600

13 LEVIN, FISHBEIN, SEDRAN & BERMAN  
14 Howard J. Sedran  
15 510 Walnut Street  
16 Philadelphia, Pennsylvania 19106  
17 Telephone: 215-592-1500

18 Attorneys for Plaintiff  
19  
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# Exhibit A

Exh. A  
47



Ex. A  
48



**Give your child a "vitamin" for their brain every day!**

The school-age years bring a whole new set of challenges for young children. Ensuring that they get the proper amount of rest and eat a healthy diet is key. Supplementing their diet with DHA, an Omega-3 fatty acid and essential brain nutrient, will help keep your child's brain functioning at its best.\*

BrainStrong™ Kids great tasting gummies contain *life'sDHA*™, the same brand of DHA found in infant formula. Since most kids don't eat the foods that naturally contain DHA, a supplement containing DHA is especially important to help promote optimal brain function.\*

**Supplement Facts**

Serving Size: One (1) Gummy		Servings Per Container: 30	
	Amount Per Serving	% DV 3 years of age	% DV 4+ years of age
Calories	5		
Carbohydrates	1g	0%	0%
Sugars	1g		
Vitamin A (Palmitate)	2500 IU	100%	50%
Vitamin C (as Ascorbic Acid)	60 mg	150%	100%
Vitamin D3 (as Cholecalciferol)	200 IU	50%	50%
Vitamin E (as d-tocopherol acetate)	10 IU	100%	33%
Riboflavin (Vitamin B2)	1.6 mg	200%	94%
Vitamin B6 (Pyridoxine HCl)	1.5 mg	180%	75%
Pantothenic Acid (as d-pantethenol)	5 mg	100%	50%
DHA (docosahexaenoic acid from algal oil)	100 mg	†	†

\*Percent Daily Values based on a 2,000 calorie diet. † Daily Value not established.

Other Ingredients: Glucose syrup, sugar, gelatin, dextrose, orange flavor, soy lecithin, lemon flavor, mixed carotenoids (containing glycerol, coconut oil), citric acid, malic acid, glazing agent (fractionated coconut oil and/or palm kernel oil, coconut oil, and high oleic sunflower oil, and carnauba wax), sunflower oil, anthocyanins, water.

**Directions:** For children 3+ years of age, chew one gummy daily. Not intended for children under 3 years of age due to risk of choking. THIS PRODUCT IS INTENDED FOR USE UNDER ADULT SUPERVISION ONLY. KEEP OUT OF REACH OF CHILDREN.

Distributed by AmeriLift, Inc. Cromwell, CT 06416. Made in the United Kingdom.

\*These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure or prevent any disease.

life'sDHA™ is from an all-natural, vegetarian source of DHA; not fish. You get the benefits of DHA without the worry of ocean-borne pollutants and toxins potentially found in certain fish. From start to finish, life'sDHA™ is produced in an FDA-inspected facility with controls in place to ensure the highest quality product.

Tamper evident: Do not use if blister foil or seal is open or damaged.

Store at room temperature. Do not expose to excessive heat, humidity or direct sunlight.

For questions, concerns, or to report an adverse event, please call (800) 722-3476. [www.brainstrongdha.com](http://www.brainstrongdha.com)

life'sDHA™ is a trademark of Martek Biosciences Corporation.

© AmeriLift, Inc. 2011

BRN46105-2

CR314/1

Exh. A  
49

NATURAL DHA DAILY SUPPLEMENT

**brainstrong™**powered by **life'sDHA™****brainstrong™**powered by **life'sDHA™****Supplement Facts**Serving Size: One (1) Packet  
Servings Per Container: 30

	Amount Per Serving	% Daily Value*
Calories	10	
Calories from fat	5	
Total fat	0.5 g	1%**
Sodium	10 mg	0%
Total carbohydrate	1g	0%
DHA (docosahexaenoic acid from algal oil)	100 mg	†
Vitamin C	80 mg	150%

\*\*Percent Daily Values based on a 2,000 calorie diet.

† Daily Value not established.

Other Ingredients: Gelatin, sugar, corn starch, arachidonic acid oil, sodium ascorbate, soy lecithin.  
Contains fish and soy.

Directions: For children ages 1- 3 years - One (1) packet of BrainStrong Toddler per day.

As with any nutritional supplement, please inform your healthcare professional before use.  
Distributed by Amerifill, Inc. 55 Sebetha Drive, Cromwell, CT 06416  
© Amerifill, Inc. 2010

For best results, mix one packet of BrainStrong Toddler into the following foods:

4 oz. yogurt	1/3 cup mac-n-cheese
4 oz. pudding	1/4 cup mashed potatoes
1/2 cup oatmeal	1 cup 2% milk

For questions, concerns, or to report an adverse event, please call (800) 722-3476. [www.brainstrongdha.com](http://www.brainstrongdha.com)

NATURAL DHA DAILY SUPPLEMENT

**brainstrong™****NEW!** powered by **life'sDHA™****TODDLER**

Supports brain development and function\*

Contains the same brand of DHA found in infant formula

Flavorless, convenient to use

**30** 100mg DHA packets

\*This statement has been approved by the Food and Drug Administration. This product is not intended to diagnose, treat, cure or prevent any disease.

brainstrong™  
powered by life'sDHA™

brainstrong™  
powered by life'sDHA™

**Give your child a boost during this intense period of growth and development!**

DHA is an Omega 3 fatty acid that is vital for brain and eye development not only during infancy but throughout your child's developmental years.\* Since your child is no longer breast or bottle-feeding, they may not be receiving the amount of DHA that he or she needs.

BrainStrong™ Toddler contains *life'sDHA*™, the same safe and natural DHA found in infant formula, to help meet your child's continuous need for DHA during this intense period of growth and development.\* Since most kids don't eat the foods that naturally contain DHA, a DHA supplement is especially important during this time. Flavorless and convenient to use, just sprinkle BrainStrong Toddler on your little one's favorite foods daily and give them an added boost they need.

*life'sDHA*™ is from an all-natural, vegetarian source of DHA; not fish. You get the benefits of DHA without the worry of ocean-borne pollutants and toxins potentially found in certain fish. From start to finish, *life'sDHA*™ is produced in an FDA-inspected facility with controls in place to ensure the highest quality product.

*life'sDHA*™ is a trademark of Martek Biosciences Corporation.

Keep out of reach of children.

Tamper evident: Powder sealed in packet. Do not use if packet is torn, open or damaged.

Store at room temperature. Do not expose to excessive heat, humidity or direct sunlight.

\*These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure or prevent any disease.

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018257-1  
12/10



Exh. A  
51



**brainstrong™**

powered by **life's DHA**

**Strengthen your brain and boost your short-term memory naturally!**

Maintaining a healthy brain as you age is easier than you think. Regular exercise, getting enough sleep and eating a healthy, well-balanced diet with a sufficient amount of the omega-3 DHA will certainly help. DHA is the healthy fatty acid that helps keep our brains running optimally as we age. In fact, 97% of our omega-3s in the brain are DHA. Just like we need vitamin for strong bones, we need DHA for strong brains.

Brainstrong™ Adult is uniquely formulated with life's DHA, the only source of DHA clinically shown to improve memory in adults over 40, plus 4-cholesterol and green tea extract to naturally support mental sharpness and energy. Taken as directed, Brainstrong™ Adult will naturally protect your brain against normal cognitive decline associated with aging as well as enhance your mental clarity.

life's DHA is from an all-natural, vegetarian source of DHA, not fish. You get the benefits of DHA without the worry of a seafood allergy, and studies potentially found in fish oil that start to fishy. Brainstrong™ is produced in an FDA-inspected facility with careful attention to ensure the highest quality product.

© 2012 The Natural Health Products Company

There is no other natural source of DHA in the world. Brainstrong™ is the only DHA supplement that is 100% natural and contains no fish oil.

NATURAL DHA DAILY SUPPLEMENT

**brainstrong™**

powered by **life's DHA**

**NEW!!**

**ADULT**

Clinically shown to improve memory!!

Naturally supports mental clarity

Helps protect against normal cognitive decline as we age



not actual age

**90** young DHA strength

These statements have not been evaluated by the FDA. This product is not intended to diagnose, treat, cure, or prevent any disease. © 2012 The Natural Health Products Company

52A





## SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

APR 20 2012

DATE: 04/16/12

DEPT. 323

HONORABLE ELIHU M. BERLE

JUDGE

B. DEL BARIO

DEPUTY CLERK

HONORABLE

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

L. PLAZOLA, C.A.

Deputy Sheriff

NOT REPORTED

Reporter

9:00 am

BC481048

Plaintiff

Counsel

AMY JOVEL

NO APPEARANCES

VS

Defendant

I-HEALTH INC

Counsel

## NATURE OF PROCEEDINGS:

## COURT RULING RE COMPLEX DETERMINATION

This case is hereby determined to be complex within the meaning of Rule 3.400 of the California Rules of Court. The case is ordered reassigned to Judge John Shepard Wiley, Jr. in Department 311 at the Central Civil West Courthouse for all further proceedings and for all purposes.

The case is ordered stayed until the initial status conference date. Notice of Initial Status Conference is to be given by the Clerk in Department 311. No responsive pleadings may be filed until further order of the Court. Parties may file a Notice of Appearance in lieu of an answer or other responsive pleading. The filing of a Notice of Appearance shall not constitute a general appearance, and shall not waive any substantive or procedural challenge to the complaint. Nothing herein stays the time for filing affidavit of prejudice pursuant to Code of Civil Procedure section 170.6.

Pursuant to Government Code section 70616 (c), each party is ordered to pay \$550.00 for complex fees, payable to Los Angeles Superior Court, within ten (10) calendar days from this date.

Plaintiff is ordered to forthwith serve a copy of this minute order on all parties, and to file a proof

## SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 04/16/12

DEPT. 323

HONORABLE ELIHU M. BERLE

JUDGE

B. DEL BARIO

DEPUTY CLERK

HONORABLE

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

L. PLAZOLA, C.A.

Deputy Sheriff

NOT REPORTED

Reporter

9:00 am

BC481048

Plaintiff

Counsel

NO APPEARANCES

AMY JOVEL

VS

Defendant

I-HEALTH INC

Counsel

## NATURE OF PROCEEDINGS:

of service in the assigned department within seven (7) days of service.

Any party objecting to the complex designation must file an objection with proof of service in Department 323 within ten (10) days of service of this minute order. Any response to the objection must be filed in Department 323 within seven (7) days of service of the objection. This Court will make its ruling on the submitted pleadings.

CLERK'S CERTIFICATE OF MAILING/  
NOTICE OF ENTRY OF ORDER

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of 04-16-2012 upon each party or counsel named below by depositing in the United States mail at the courthouse in Los Angeles, California, one copy of the original entered herein in a separate sealed envelope for each, addressed as shown below with the postage thereon fully prepaid.

Date: April 16, 2012

Page 2 of 3 DEPT. 323

MINUTES ENTERED  
04/16/12  
COUNTY CLERK

Exh A  
54

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES**

DATE: 04/16/12

DEPT. 323

HONORABLE ELIHU M. BERLE

JUDGE

B. DEL BARIO

DEPUTY CLERK

HONORABLE

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

L. PLAZOLA, C.A.

Deputy Sheriff

NOT REPORTED

Reporter

9:00 am

BC481048

Plaintiff

Counsel

AMY JOVEL

NO APPEARANCES

VS

Defendant

I-HEALTH INC

Counsel

**NATURE OF PROCEEDINGS:**

John A. Clarke, Executive Officer/Clerk

By: B. DelBarrio, Deputy Clerk

BONNETT, FAIRBOURN, FRIEDMAN & BALINT, P.C.  
Patricia N. Syverson  
2901 Central Avenue, Suite 1000  
Phoenix, AZ 85012





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kris.elder@hoganlovells.com  
6 jenny.shen@hoganlovells.com

7 Attorneys for Defendant  
8 I-HEALTH, INC.

9  
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 COUNTY OF LOS ANGELES – CENTRAL DISTRICT

12 AMY JOVEL, On Behalf of Herself and  
13 All Others Similarly Situated,

14 Plaintiff,

15 v.

16 I-HEALTH, INC., a Delaware Corporation,

17 Defendant.

Case No. BC481048

**STIPULATION AND [PROPOSED] ORDER  
TO EXTEND THE TIME FOR DEFENDANT  
TO RESPOND TO THE COMPLAINT**

18 WHEREAS, on March 16, 2012, Plaintiff Amy Jovel filed a Complaint and Summons in  
19 this action;

20  
21 WHEREAS, Defendant I-Health, Inc. was served with the Complaint and Summons on  
22 March 20, 2012;

23  
24 WHEREAS, since it received the Complaint, Defendant's counsel has worked diligently  
25 to determine the facts, analyze Plaintiff's allegations and develop Defendant's defenses and  
26 response to the Complaint, and Defendant's counsel needs additional time to complete this  
27 process;

28 WHEREAS, for the foregoing reasons, Defendant requests a thirty day extension of time

1 from its response date of April 19, 2012, through and including May 21, 2012, in which to  
2 evaluate the matter and file its response to the Complaint;

3  
4 WHEREAS, this request for an extension of time is made in good faith and not for the  
5 purpose of delay, and will not prejudice any party;

6 WHEREAS, Plaintiff and her counsel are agreeable to this thirty day extension;

7  
8 IT IS HEREBY STIPULATED, by and between the parties, through their respective  
9 counsel, that the time for Defendant to respond to Plaintiff's Complaint is continued for thirty  
10 days, from April 19, 2012 to May 21, 2012.

11 IT IS SO STIPULATED.

12  
13 Dated: April 16, 2012

HOGAN LOVELLS US LLP

14  
15 By: Robert Hawk / *signed with permission by*  
16 *Aspak Nourie*  
17 Robert B. Hawk

18  
19 Attorneys for Defendant  
I-HEALTH, INC.

20  
21 Dated: April 16, 2012

BONNETT, FAIRBOURN, FRIEDMAN &  
BALINT, P.C.

22 By: Todd D. Carpenter  
23 Todd D. Carpenter

24 Attorneys for Plaintiff  
AMY JOVEL

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**ORDER**

The time for Defendant to respond to Plaintiff's Complaint is continued for thirty days,  
from April 19, 2012 to May 21, 2012.

IT IS SO ORDERED.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge  
Superior Court of the State of California  
County of Los Angeles



**PROOF OF SERVICE**

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is Hogan Lovells US LLP, 1999 Avenue of the Stars, Suite 1400, Los Angeles, California 90067. On April 16, 2012, I served a copy of the within document(s):

**STIPULATION AND [PROPOSED] ORDER TO EXTEND THE TIME FOR DEFENDANT TO RESPOND TO THE COMPLAINT**

- ☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- ☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, the United States mail at Los Angeles, California addressed as set forth below.
- ☐ by placing the document(s) listed above in a sealed FEDERAL EXPRESS envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a FEDERAL EXPRESS agent for delivery.
- ☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- ☒ by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

**SEE SERVICE LIST**

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on April 16, 2012, at Los Angeles, California.

\_\_\_\_\_  
Mae F. Chester

SERVICE LIST

BONNETT, FAIRBOURN,  
FRIEDMAN & BALINT, P.C.

Patricia N. Syverson  
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*Attorneys for Plaintiff*  
Amy Jovel

Em. A  
60  
- 2 -



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6 jenny.shen@hoganlovells.com

7  
8 Attorneys for Defendant  
I-HEALTH, INC.

9  
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 COUNTY OF LOS ANGELES – CENTRAL DISTRICT

12 AMY JOVEL, On Behalf of Herself and  
13 All Others Similarly Situated,

14 Plaintiff,

15 v.

16 I-HEALTH, INC., a Delaware Corporation,

17 Defendant.

Case No. BC481048

**NOTICE OF CONSENT TO  
ELECTRONIC SERVICE**

18  
19 PLEASE TAKE NOTICE that i-Health, Inc. has agreed to accept electronic service at the  
20 following electronic service addresses: robert.hawk@hoganlovells.com,  
21 kris.elder@hoganlovells.com, and jenny.shen@hoganlovells.com.

22 Dated: April 18, 2012

HOGAN LOVELLS US LLP

23  
24 By: 

Robert B. Hawk

25  
26 Attorneys for Defendant  
I-HEALTH, INC.  
27  
28



**PROOF OF SERVICE**

I am a citizen of the United States and employed in Santa Clara County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is Hogan Lovells US LLP, 525 University Ave., 4<sup>th</sup> Floor, Palo Alto, California 94301. On April 20, 2012, I served a copy of the within document(s):

**NOTICE OF CONSENT TO ELECTRONIC SERVICE**

- ☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- ☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, the United States mail at Palo Alto, California addressed as set forth below.
- ☐ by placing the document(s) listed above in a sealed FEDERAL EXPRESS envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a FEDERAL EXPRESS agent for delivery.
- ☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- ☒ by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

**SEE SERVICE LIST**

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on April 20, 2012, at Palo Alto, California.

  
Evelyn Perry

SERVICE LIST

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*Attorneys for Plaintiff*  
Amy Jovel

Ex. A

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- 2 -

PROOF OF SERVICE



## NOTICE SENT TO:

Carpenter, Todd D.  
 Bonnett, FairBourn, Friedman & Balint,  
 600 West Broadway, Suite 900  
 San Diego CA 92101

**FILED**  
 LOS ANGELES SUPERIOR COURT

APR 25 2012

JOHN A. CLARKE, CLERK

## SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

AMY JOVEL

Plaintiff(s),

VS.

I-HEALTH INC

Defendant(s).

CASE NUMBER

BC481048

NOTICE OF STATUS CONFERENCE  
AND ORDER

To plaintiff/petitioner and self-represented parties: Notice is hereby given that the Status Conference in the above-entitled action will be held on May 18, 2012 at 8:30 am in Department 311 of the Central District, located at 600 South Commonwealth Avenue, Los Angeles, California 90005. Re: Status Conference

--

At the Status Conference the Court will determine the present status of the case, how to achieve compliance with time standards, whether any party has not been diligent in pursuing the case, and will make appropriate orders intended to move this matter forward to final disposition.

[ ] Plaintiff/Petitioner and self-represented parties must appear at the Status Conference unless within five days before the status conference, the following has occurred:

[ ] Arbitration Award has been filed.

[ ] A Request for Trial De Novo has been filed.

[ ] Judgment has been entered.

[ ] Statement of Agreement has been filed.

[ ] A Request for Dismissal of the entire action has been filed.

[ ] Other: \_\_\_\_\_

## ORDER

[ ] Plaintiff/Petitioner is ordered to give notice of said hearing forthwith to any party served with summons and complaint before the status conference hearing and file a Proof of Service in this department within five days before the hearing.

Failure to comply or appear may result in an Order to Show Cause re the imposition of sanctions.

Dated: April 25, 2012

JOHN A. CLARKE, CLERK

## CERTIFICATE OF MAILING

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the Notice of Status Conference and Order upon each party or counsel named above by depositing in the United States mail at the courthouse in Los Angeles, California, one copy of the original filed/entered herein in a separate sealed envelope to each address as shown above with the postage thereon fully prepaid.

Dated: April 25, 2012

John A. Clarke, EXECUTIVE OFFICER/CLERK

By: [Signature] Deputy Clerk

## NOTICE OF STATUS CONFERENCE AND ORDER

LACIV 167 (Rev. 01/07)  
 LASC Approved 06-04

LASC Local Rules, Chapter 7  
 Cal. Rules of Court, rule 2.2 et seq.

Eph. A  
 64





COPY

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6 jenny.shen@hoganlovells.com

7 Attorneys for Defendant  
8 I-HEALTH, INC.

ORIGINAL FILED

MAY 18 2012

LOS ANGELES  
SUPERIOR COURT

9  
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 COUNTY OF LOS ANGELES – CENTRAL DISTRICT

12 AMY JOVEL, On Behalf of Herself and  
13 All Others Similarly Situated,

14 Plaintiff,

15 v.

16 I-HEALTH, INC., a Delaware Corporation,

17 Defendant.

Case No. BC481048

DEFENDANT I-HEALTH'S STATUS  
CONFERENCE REPORT

Date: May 25, 2012

Time: 8:30 a.m.

Dept.: 311

Judge: Hon. John Shepard Wiley

Trial Date: None Set

Action Filed: March 16, 2012

19  
20 Defendant, i-Health, Inc. ("i-Health") hereby respectfully submits this status conference  
21 report in advance of the status conference scheduled for May 25, 2012.

22 I. Background

23 i-Health manufactures certain dietary supplements under the BrainStrong brand, which  
24 contain docosahexaenoic acid ("DHA") derived from algal oil. Plaintiff filed this putative class  
25 action on March 16, 2012 against i-Health, alleging that certain product claims on BrainStrong  
26 labels lack scientific substantiation and, therefore, are false and misleading. Based on this  
27 purported lack of substantiation, plaintiff asserts claims—on behalf of a class of California  
28 consumers who purchased certain BrainStrong products since April 2011—under: (1) the

1 California Unfair Competition Law; (2) the California Consumers Legal Remedies Act; and (3)  
 2 express warranty law.

3 This lawsuit was filed virtually simultaneously with a putative class lawsuit now pending  
 4 in the United States District Court for the Eastern District of New York, *Yee v. i-Health, Inc.*,  
 5 Case No. CV 12-1504, involving nearly identical factual allegations about i-Health and its  
 6 BrainStrong products. The plaintiff in the *Yee* lawsuit purports to assert claims on behalf of a  
 7 *nationwide class of consumers* who purchased certain BrainStrong products from April 2011 to  
 8 present.

9 In accordance with the local rules in the Eastern District of New York, iHealth's initial  
 10 response to the *Yee* complaint is a letter to the Court, requesting a conference to set a briefing  
 11 schedule for a motion to dismiss on the grounds outlined in the pre-motion letter. i-Health's letter  
 12 was submitted to the Court and served on May 18, 2012. See attached Exhibit A. i-Health has  
 13 argued—and will brief to the Eastern District of New York Court—that the *Yee* complaint should  
 14 be dismissed because, among other reasons, (1) it is preempted by federal law, (2) the complex,  
 15 scientific issues in the case are better left to the authority and expertise of the Food and Drug  
 16 Administration under the primary jurisdiction doctrine, (3) lack of substantiation claims are not  
 17 cognizable, and (4) the factual allegation in the complaint fails to state a claim under applicable  
 18 pleading rules.

## 19 II. Status of This Case

20 To date, there has been almost no activity in the instant case. Plaintiff effected service of  
 21 the complaint on March 20, 2012. By Stipulation filed on April 17, 2012 and Order entered on  
 22 April 24, 2012, i-Health's response to the complaint was due on May 21, 2012. In the interim,  
 23 however, this matter was designated complex pursuant to Rule 3.400 of the California Rules of  
 24 Court, and the action was stayed until the initial status conference set for May 25, 2012. The  
 25 order designating this matter as complex made clear that no response to the Complaint was to be  
 26 filed until further order of this Court.

27 Given the early stage of the litigation, the parties have not yet discussed settlement or  
 28 other early resolution of the matter.

Exh. A  
 - 2 -



1           **III. Anticipated Motions**

2           In light of the *Yee* matter pending in the Eastern District of New York—which involves  
 3 claims asserted by a nationwide putative class, based on the same allegations as those made in  
 4 this case—i-Health intends to ask this Court to stay this action until such time as the *Yee* action is  
 5 resolved or otherwise concluded. In these circumstances, a stay of the state court action is  
 6 appropriate. *See, e.g., Berg v. MTC Electronics Technologies*, 61 Cal. App. 4th 349 (1998)  
 7 (affirming LA Superior Court's staying a case in favor of several similar suits pending in the  
 8 Eastern District of New York); *Caiafa Prof. Law Corp. v. State Farm Fire & Cas. Co.*, 15 Cal.  
 9 App. 4th 800 (1993) (stating that a California court has the discretion to stay a state court action  
 10 when a federal action has been filed covering the same subject matter as the state court action).

11           Counsel for i-Health has discussed with plaintiff's counsel the possibility of consolidating  
 12 this action with *Yee* or having plaintiff's counsel otherwise join with the *Yee* plaintiff. To date,  
 13 however, defendant's counsel has not received a definitive response from plaintiff's counsel  
 14 regarding possible consolidation of the actions.

15           i-Health respectfully requests that it be permitted to file, and that the Court decide, a  
 16 motion to stay this case—before i-Health is required to otherwise respond to the Complaint. If  
 17 this case is not stayed pending resolution of the *Yee* action, i-Health would then expect to file a  
 18 demurrer raising largely the same substantive arguments covered in the motion to dismiss in *Yee*.

19           Dated: May 18, 2012

HOGAN LOVELLS US LLP

21           By: 

22           Robert B. Hawk

23           Attorneys for Defendant  
 24           I-HEALTH, INC.

25           Edh.A  
 26           67  
 27           - 3 -



**PROOF OF SERVICE**

I am a citizen of the United States and employed in San Francisco County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is Hogan Lovells US LLP, 4 Embarcadero Center, 22<sup>nd</sup> Floor, San Francisco, California 94111. On May 18, 2012, I served a copy of the within document(s):

**DEFENDANT I-HEALTH'S STATUS CONFERENCE REPORT**

- ☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- ☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, the United States mail at San Francisco, California addressed as set forth below.
- ☐ by placing the document(s) listed above in a sealed FEDERAL EXPRESS envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a FEDERAL EXPRESS agent for delivery.
- ☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- ☒ by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

**SEE SERVICE LIST**

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 18, 2012, at San Francisco, California.

  
\_\_\_\_\_  
Gregory Johnson

Exh. A  
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**PROOF OF SERVICE**

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*Attorneys for Plaintiff*  
Amy Jovel

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- 2 -

# EXHIBIT A

Exh. A  
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May 18, 2012

HOGAN LOVELLS US LLP  
875 3rd Avenue  
New York, NY 10022  
Telephone: 212-918-3000  
Facsimile: 212-918-3100

**Via ECF and Hand Delivery**

Honorable Frederic Block  
U.S. District Court for the Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, New York 11201

**Re: Yee v. I-Health, Inc., Case No. CV 12-1504**

Dear Judge Block:

We write on behalf of defendant i-Health, Inc. ("i-Health") to request a pre-motion conference to permit i-Health to file a motion to dismiss the referenced complaint pursuant to Federal Rules of Civil Procedure 8(a), 9(b) and 12(b)(6).

i-Health manufactures certain dietary supplements under the BrainStrong brand, which contain docosahexaenoic acid ("DHA") derived from algal oil. Plaintiff alleges that certain product claims on BrainStrong labels lack scientific substantiation and, therefore, are false and misleading. Based on this purported lack of substantiation, plaintiff asserts claims—on behalf of a putative nationwide and New York sub-class of consumers who purchased certain BrainStrong products since April 2011—under: (1) the Magnuson-Moss Act; (2) unjust enrichment principles; (3) express warranty law; (4-5) intentional misrepresentation and fraudulent concealment/nondisclosure principles; and (6-7) New York General Business Law Sections 349-350.

**I. Plaintiff's Claims Are Preempted By Federal Law.**

i-Health requests that the Court dismiss plaintiff's claims, because they impermissibly would impose requirements on i-Health different from those imposed by the comprehensive federal regulatory scheme governing dietary supplements administered by the Food and Drug Administration ("FDA"). FDA is authorized under the federal Food, Drug and Cosmetics Act ("FDCA"), as amended by the Nutrition Labeling and Education Act of 1990 ("NLEA") and the Dietary Supplement and Health Education Act of 1994 ("DSHEA"), 21 U.S.C. § 343(r) *et seq.*, to regulate the manufacture, advertising and labeling of dietary supplements. Congress intended for this federal framework to "supersede the [then] current and ad hoc, patchwork regulatory policy on dietary supplements."<sup>1</sup>

Federal law preemption doctrine requires dismissal of plaintiff's claims on preemption grounds, because the FDCA *expressly preempts* state requirements for dietary supplement labeling that are

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<sup>1</sup> Pub. L. 103-417 § 2(15)(B), 108 Stat. 4325, 4326 (Oct. 25, 1994).

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Honorable Frederic Block

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not identical to federal requirements.<sup>2</sup> 21 U.S.C. § 343-1.<sup>3</sup> Here, federal law specifically provides for and regulates claims about the benefits of dietary supplements. In particular, the FDCA permits, under specified conditions, "structure-function" claims, like those at issue, which "describe the role of a nutrient or dietary ingredient intended to affect the structure or function in humans," or "describe[] general well-being from consumption of a nutrient or dietary supplements," if the manufacturer can substantiate the claim is truthful and not misleading. 21 U.S.C. § 343(r)(6). Moreover, the FDCA provides for review of supplement claims and gives FDA enforcement authority where a product bears false or misleading labeling. The regulatory process requires a supplement manufacturer making a structure-function claim to notify FDA within 30 days of marketing the product, 21 U.S.C. § 343(r)(6), and FDA may then object if it finds the claim inappropriate. i-Health submitted such notice for its BrainStrong products in March 2011, and FDA has issued no notice disputing the appropriateness of i-Health's product claims. Private litigation, which would in effect create additional burdens in assessing or proving substantiation for dietary supplement labeling claims, imposes requirements "not identical" to federal requirements and is thus preempted.

## II. Dismissal Is Warranted Under the Primary Jurisdiction Doctrine.

Should this Court conclude for any reason that plaintiff's claims are not preempted, dismissal would still be proper because FDA has primary jurisdiction of the issues raised. Under the primary jurisdiction doctrine, courts routinely dismiss claims involving issues that are appropriately left to an "administrative agency with more specialized experience, expertise, and insight." *Bernhardt v. Pfizer, Inc.*, Nos. 00 Civ. 4042, 4379, 2000 WL 1738645 at \*2-3 (S.D.N.Y. Nov. 22, 2000) (deferring to FDA based on primary jurisdiction); *United States v. Western Pac. R.R. Co.* 352 U.S. 59, 64 (1956).

The factors courts consider in deciding primary jurisdiction weigh heavily in favor of applying the doctrine here. See *Bernhardt*, 2000 WL 1738645, at \*2 (listing factors). First, the question plaintiff would put at issue—whether scientific studies adequately substantiate claims BrainStrong label claims concerning the benefits of algal DHA—is not within the conventional experience of the judiciary, but rather involves "technical and intricate questions of fact and policy that Congress has assigned to a specific agency." *Id.* FDA is better equipped to analyze, and has superior experience in weighing, scientific studies.<sup>4</sup> Second, substantiation issues are particularly within both FDA's expertise and authority to regulate dietary supplement labeling; it would be inappropriate for the

<sup>2</sup> "In general, three types of preemption exist: (1) express preemption, where Congress has expressly preempted local law; (2) field preemption, 'where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law'; and (3) conflict preemption, where local law conflicts with federal law . . . ." *New York SMSA Ltd. Partnership v. Town of Clarkstown*, 612 F.3d 97, 104 (2d Cir. 2010). Preemption standards apply equally to state law claims asserted in court as they do to state statutes or regulations. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959).

<sup>3</sup> Specifically, the FDCA explicitly preempts states from "directly or indirectly establish[ing] under any authority . . . any requirement respecting any claim of the type described in section 403(r)(1) [of the FDCA] made in the label or labeling of food that is not identical to the requirement of section 403(r)." 21 U.S.C. § 343-1. This preemptive language applies to dietary supplement structure-function labeling claims, like those here, via Section 403(r)(1) and by incorporation Section 403(r)(6) of the FDCA. 21 U.S.C. §§ 343(r)(1)(b) and 343(r)(6).

<sup>4</sup> See, e.g., *Premo Pharm. Labs., Inc. v. United States*, 629 F.2d 795, 803 (2d Cir. 1980) ("[T]he FDA...as distinguished from a court, possesses superior expertise, usually of a complex scientific nature"; *Aaronson v. Vital Pharmaceuticals, Inc.*, No. 09-CV-1333, 2010 U.S. Dist. LEXIS 14160 at \*8-9, No. 09-CV-1333 (S.D. Cal. Feb. 17, 2010) (the FDA's "ability to discern scientific data and ensure uniform regulation in the field of dietary supplements weigh in favor of dismissing on ... the grounds of the FDA's primary jurisdiction").

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Honorable Frederic Block

- 3 -

Court to usurp FDA's role.<sup>5</sup> *Third*, resolution by *different courts* of the technical issues raised here presents a danger of inconsistent rulings (which is of particular concern, as another putative class action alleging virtually identical claims is pending in California state court, *Jovel v. I-Health, Inc.*, Case No. BC481048). *Fourth*, resolution of this matter via a private suit, is not appropriate given that plaintiff may raise these issues directly with FDA in a citizen petition. See 21 C.F.R. §10.30.

### III. Plaintiff's Lack Of Substantiation Claims Are Not Cognizable.

Each of plaintiff's claims is premised upon the sole allegation that i-Health's label claims are not substantiated by scientific studies. As an initial matter, i-Health wants the Court to understand that it emphatically denies plaintiff's substantive allegations: i-Health's label claims are well supported by scientific studies. In all events, however, Courts have held that such lack of substantiation claims cannot stand.<sup>6</sup> Regulators, not private consumers, are the proper parties to demand substantiation of labeling claims; alleged lack of substantiation, without more, does not support an inference that a label claim is false or misleading. See, e.g., *Franulovic v. Coca-Cola Co.*, 390 Fed. Appx. 125 (3d Cir. 2010).

### IV. Plaintiff Fails To State A Claim Under Rules 8(a) and 9(b).

Plaintiff's bare, conclusory allegations do not meet pleading requirements. The complaint contains no factual allegations whatsoever regarding (1) how or why i-Health's product claims are unsubstantiated, (2) when or where plaintiff purchased the product, or (3) whether he relied on, or was even aware, of the product claims at issue.<sup>7</sup> The complaint fails to satisfy Rule 8(a) or the heightened pleading requirements of Rule 9(b) that are applicable where plaintiffs' claims sound in fraud. See, e.g., *Silverman Partners, L.P. v. First Bank*, 687 F. Supp. 2d 269 (E.D.N.Y. 2010).

### V. Plaintiff's Claims Are Deficient for Other Reasons.

Plaintiff's claims fail for various other reasons. Plaintiffs do not state a claim under the Magnuson-Moss Act, as plaintiffs allege no "written warranty" as defined by the Act. *In re Sears*, Nos. MDL-1703; 05 C 4742; 05 C 2623, 2006 WL 1443737 (N.D. Ill. May 17, 2006). Plaintiff's claims under New York General Business Law Sections 349 and 350 lack merit, because the sole injury alleged is the purchase of the product itself.<sup>8</sup> And, Plaintiff's unjust enrichment claim fails under the laws of various states because it is not a viable cause of action and/or other remedies at law are available.

<sup>5</sup> See, e.g., *Gordon v. Church & Dwight Co.*, No. C09-5585, 2010 U.S. Dist. LEXIS 32777 (N.D. Cal. Apr. 2, 2010) ("[i]t would be inappropriate for this court to assume the FDA's regulatory role, and interpret scientific studies or other evidence to determine whether the labeling of [the product] should be changed"); *Braintree Labs., Inc. v. Nephro-Tech, Inc.*, No. 96-2459, 1997 WL 94237 (D. Kan. Feb. 26, 1997) (labeling claims are more appropriately addressed by the FDA).

<sup>6</sup> See, e.g., *Chavez v. Nestle USA, Inc.*, CV-09-9192, 2011 WL 2150128, \*5-6 (C.D. Cal. May 19, 2011) (dismissing claims under based upon alleged lack of substantiation); see also, *Stanley v. Bayer Healthcare LLC*, 11CV862, 2012 WL 1132920 (S.D. Cal. Apr. 3, 2012); *Fraker v. Bayer Corp.*, CVF08-1564, 2009 WL 5865687, \*8-9 (E.D. Cal. Oct. 6, 2009).

<sup>7</sup> The breach of express warranty claim fails for this reason. See *CBS Inc. v. Ziff-Davis Publishing Co.*, 75 N.Y.2d 496, 503-04 (1990).

<sup>8</sup> See, e.g., *Donahue v. Ferolito, Vultaggio & Sons*, 786 N.Y.S.2d 153, 154 (1<sup>st</sup> Dept. 2004) (dismissal for lack of injury where plaintiffs alleged deceptive labels caused them to spend money but receive no health benefits in return).

Encl. A  
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Honorable Frederic Block

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Should Your Honor have any questions, we would be pleased to respond.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Frank T. Spano". The signature is fluid and cursive, with the first name "Frank" being more prominent.

Frank T. Spano  
Direct: 212-918-3522  
[Frank.spano@hoganlovells.com](mailto:Frank.spano@hoganlovells.com)

Copy via E-Mail to:  
Nadeem Faruqi, Esq.

Encl. A  
74







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15 Attorneys for Plaintiff

16 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
17 COUNTY OF LOS ANGELES

18 AMY JOVEL, On Behalf of Herself and  
All Others Similarly Situated,

19 Plaintiff,

20  
21 v.

22 I-HEALTH, INC., a Delaware  
23 Corporation

24 Defendant.  
25

Case No.: BC481048

**PLAINTIFF'S STATUS CONFERENCE  
REPORT**

Date: May 25, 2012

Time: 8:30 a.m.

Dept.: 311

Judge: Hon. John Shepard Wiley

Trial Date: None set

Action Filed: March 16, 2012

1 Plaintiff Amy Jovel, by and through her attorneys, respectfully submits this status  
2 conference report in advance of the status conference scheduled for May 25, 2012.

### 3 I. BACKGROUND

4 This consumer class action arises out of Defendant I-Health's advertising and sale  
5 of BrainStrong, a line of four dietary supplements fortified with highly processed  
6 fermented algae.<sup>1</sup> Plaintiff alleges claims for violations of the Consumers Legal  
7 Remedies Act ("CLRA"), Civil Code §1750, *et seq.*, the Unfair Competition Law  
8 ("UCL"), Bus. & Prof. Code §17200, *et seq.*, and breach of express warranty. Plaintiff's  
9 claims concern Defendant's advertising and labeling, including representations that  
10 accompanied each and every box of BrainStrong that the products support brain  
11 development and function in children and adults. Those claims are false, misleading and  
12 reasonably likely to deceive the average consumer because the scientific evidence is that  
13 Defendant's products do not work as represented. Defendant's brain health claims and  
14 related representations were uniformly made throughout the Class Period and are false,  
15 misleading and reasonably likely to deceive the public. As a result, Plaintiff and the  
16 California class of consumers she seeks to represent have been damaged.

### 17 II. PROCEDURAL POSTURE

18 Plaintiff filed her putative class action complaint on March 16, 2012. On April 16,  
19 2012, the parties entered into a stipulation extending the time for Defendant to respond to  
20 the complaint to May 21, 2012. That same day Plaintiff filed a first amended complaint,  
21 amending her CLRA claim in accordance with Civil Code §1782 to add a claim for  
22 damages.

23  
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25  
26 <sup>1</sup> These products include: (1) BrainStrong Prenatal; (2) BrainStrong Toddler; (3) BrainStrong  
27 Kids; and (4) BrainStrong Adults. This lawsuit concerns only three of the products --  
28 BrainStrong Toddler, BrainStrong Kids and BrainStrong Adults (collectively "BrainStrong" or  
"the Products").

1 Before Defendant could answer the complaint, the case was designated "complex"  
2 pursuant to California Rules of Court Rule 3.400. Accordingly, the case was stayed until  
3 the initial status conference set for May 25, 2012.

4 There has not been any preliminary settlement or other early resolution discussions.  
5 Plaintiff is willing to conduct meaningful settlement discussions with Defendant.

6 **III. RELATED CASES**

7 On March 27, 2012, Plaintiff Yee filed a class action against I-Health in the United  
8 States District Court for the Eastern District of New York, *Yee v. I-Health, Inc.*, Case No.  
9 CV 12-1504. See attached Exhibit A. The Yee complaint alleges violations of the  
10 Magnuson-Moss Act, 15 U.S.C. § 2301, *et seq.*, unjust enrichment, breach of express  
11 warranty, intentional misrepresentation, fraudulent concealment, violation of the New  
12 York General Business Law §349, *et seq.*, and violation of the New York General  
13 Business Law §350, *et seq.*

14 The Yee complaint is not substantially similar to the present action. While the  
15 complaints allege similar facts – most of which were copied from Plaintiff's complaint –  
16 the causes of action and classes substantially differ. Importantly, the Yee complaint does  
17 not seek to represent California consumers for violations of California's UCL or CLRA  
18 laws. Instead, the consumer fraud counts in Yee are limited to a New York-only subclass  
19 for violations of New York law. In fact, The Yee complaint overlaps with the current  
20 action on one count – breach of express warranty. Thus, contrary to Defendant's  
21 contentions (Def. Status Report p. 3), the Yee complaint does not cover the same subject  
22 matter as this case.

23 Moreover, a stay is not appropriate here because Plaintiff's complaint is first-filed.  
24 Additionally, Defendant intends to seek dismissal of the Yee complaint, which presents  
25 different legal issues from the present case. For example, Plaintiff alleges a California-  
26 only breach of express warranty claim, while Yee seeks a nationwide class. Court's  
27 routinely deny certification of nationwide express warranty claims. See, e.g., *Rikos v.*  
28

1 *Procter & Gamble Co.*, 2012 WL 641946 (S.D. Feb. 28, 2012 Ohio) (striking nationwide  
 2 express warranty claim because there are numerous variations in the substantive breach  
 3 of warranty laws); *see also Cole v. Gen. Motors Corp.*, 484 F.3d 717 (724-30) (5th Cir.  
 4 2007) (discussing at length why warranty claims are inappropriate for class treatment).

5 Finally, in contrast to the *Yee* action, which is limited to only seeking a New York  
 6 based consumer fraud class, Plaintiff intends to amend her complaint to allege multi-state  
 7 consumer fraud claims that would include New York and other laws similar to California.  
 8 *See Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 594 (9th Cir. 2012); *Bohn v.*  
 9 *Pharmavite, LLC*, 2:11-cv-10430 (C.D. Cal May 5, 2012) (Order at 3) ("Plaintiff could  
 10 seek to certify subclasses of putative class members from individual states or subclasses  
 11 of class members from groups of states with consumer protection laws that are not  
 12 materially different."); *Diamond Multimedia Sys. v. Super. Ct.*, 19 Cal. 4th 1036, 1063-64  
 13 (1999) (California "has a clear and substantial interest in preventing fraudulent practices  
 14 in this state which may have an effect in both California and throughout the country.").

#### 15 IV. ANTICIPATED MOTIONS

16 Plaintiff intends to file a motion for class certification. Plaintiff respectfully  
 17 requests that the Court set an expedited briefing schedule for Plaintiff's second amended  
 18 complaint, Defendant's intended motion to dismiss and Plaintiff's motion for class  
 19 certification.

20 Dated: May 21, 2012

21 BONNETT, FAIRBOURN, FRIEDMAN  
 22 & BALINT, P.C.

23 *Todd D. Carpenter*  
 24

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 - 4 -



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26  
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28

**PROOF OF SERVICE**

I declare that:

I am and was at the time of service of the papers herein, over the age of eighteen (18) years and am not a party to the action. I am employed in the County of Maricopa, and my business address is 2901 N. Central Avenue, Suite 1000, Phoenix, Arizona 85012.

On May 21, 2012, I caused to be served the following documents:

**PLAINTIFF'S STATUS CONFERENCE REPORT**

☐ **VIA FACSIMILE TRANSMISSION:** (Code Civ. Proc. §§ 1013(e) and (t)): From fax number (213) 406-1101 to the fax numbers listed below and/or on the attached service list. The facsimile machine I used complied with Rule 2008 and no error was reported by the machine.

☒ **VIA ELECTRONIC FILING:** Complying with Code of Civil Procedure section 1010.6 and pursuant to agreement by the parties, I caused such document(s) to be electronically served by e-mail to the parties listed on the Service List. The file transmission was reported as complete and a copy of the Service Receipt will be maintained with the original document(s) in our office.

☐ **VIA MAIL:** By placing a copy thereof for delivery in a separate envelope addressed to each addressee, respectively, as follows:

☐ **BY FIRST-CLASS MAIL** (Code of Civ. Proc. §§ 1013 and 1013(a))

☐ **BY OVERNIGHT DELIVERY** (Code Civ. Proc. §§ 1013(c) and (d))

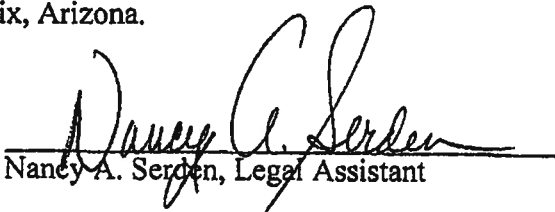
☐ **BY CERTIFIED RETURN RECEIPT MAIL** (Code of Civ. Proc. §§ 1013 and 1013(a))

**SEE ATTACHED SERVICE LIST**

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 21, 2012, at Phoenix, Arizona.

  
Nancy A. Serden, Legal Assistant

SERVICE LIST

Jovel v. I-Health, Inc.  
Case No. BC481048

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Attorneys for Defendant  
I-HEALTH, INC.

## EXHIBIT A

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**SUBMITTED**  
**UNITED STATES DISTRICT COURT**  
**EASTERN DISTRICT OF NEW YORK**

**FILED**  
**CLERK**

**2012 MAR 27 PM 4:**

**U.S. DISTRICT CO'**  
**EASTERN DIST'**  
**OF NEW YOR**

MICHAEL YEE, individually, and on behalf of  
other members of the general public similarly  
situated,

Plaintiff,

v.

I-HEALTH, INC., a Delaware Corporation,

Defendants.

) Case No.

) **CLASS ACTION COMPLAINT**

) **CV 12 - 1504**

) **JURY TRIAL DEMANDED**

**FLOCK, J.**

**J. ORENSTEIN, M.**

Plaintiff Michael Yee ("Plaintiff"), by his attorneys, makes the following allegations pursuant to the investigation of his counsel and based upon information and belief, except as to allegations specifically pertaining to himself and his counsel, which are based on personal knowledge.

**NATURE OF ACTION**

1. This is a class action against I-Health, Inc. ("I-Health" or the "Defendant") arising out of the sale of dietary supplements fortified with highly processed fermented algae, including BrainStrong Toddler, BrainStrong Kid, and BrainStrong Adult (collectively "BrainStrong").

2. I-Health represents that its BrainStrong products will support brain health. Defendant prominently makes representations on its BrainStrong packaging that it "supports brain development and function," is "clinically shown to improve memory," "naturally supports mental clarity," and "helps protect against normal cognitive decline." In fact, BrainStrong does not support brain health in children or adults and DHA algal oil supplementation is not clinically proven to support brain health. Defendant's representations are false, misleading, and reasonably likely to deceive the public.

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**83**

3. As a direct and proximate result of I-Health's false and misleading advertising claims and marketing practices, Plaintiff and the members of the Class, as defined herein, purchased I-Health BrainStrong to support brain health and were deceived by Defendant.

4. Plaintiff seeks relief in this action individually, and on behalf of all purchasers of I-Health's BrainStrong, for I-Health's violations of the Magnuson-Moss Act, 15 U.S.C. § 2301, *et seq.*, for unjust enrichment, breach of express warranty, intentional misrepresentation, fraudulent concealment, violation of the New York General Business Law §349, *et seq.*, and violation of the New York General Business Law §350, *et seq.*

#### **JURISDICTION AND VENUE**

5. This Court has subject matter jurisdiction over this nationwide class action arising under the Class Action Fairness Act of 2005, 28 U.S.C. §1332 (the Act). The Act provides for original jurisdiction in the Federal Courts of any class action in which any member of the plaintiff class is a citizen of a state different from any defendant, and in which the amount in controversy exceeds in the aggregate five million dollars (\$5,000,000), exclusive of interest and costs.

6. Plaintiff alleges that the total claims of individual Class members, in the aggregate, exceed five million dollars (\$5,000,000), as required by 28 U.S.C. §1332(d)(2) & (5), and a member of the Class of plaintiffs is a citizen of a state different from any defendant. Therefore, diversity of citizenship exists as required by 28 U.S.C. §1332(d)(2).

7. Venue is proper in this District pursuant to 28 U.S.C. §1391 because a substantial part of the events, omissions and acts giving rise to the claims herein occurred in this District.

#### **PARTIES**

8. Plaintiff Michael Yee is a resident of Brooklyn, New York who purchased BrainStrong in New York.

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9. Defendant I-Health is a Delaware corporation with its principal place of business located at 55 Sebeth Drive, Suite 102, Cromwell, Connecticut 06416. Defendant I-Health manufactured, advertised, marketed, distributed and sold BrainStrong in New York and throughout the nation.

### **FACTUAL ALLEGATIONS**

10. I-Health manufactures, distributes, markets and sells BrainStrong in virtually every major food, drug, and mass retail outlet in New York and throughout the country. BrainStrong sells for approximately \$15—\$30.

11. Defendant represents that BrainStrong products provide an essential daily supplement fortified with DHA algal oil that “supports brain development and function,” is “clinically shown to improve memory,” “naturally supports mental clarity,” and “helps protect against normal cognitive decline.”

12. For example, on Defendant’s website, I-Health prominently proclaims that BrainStrong Adult is “Clinically Shown to Improve Memory.”<sup>1</sup>

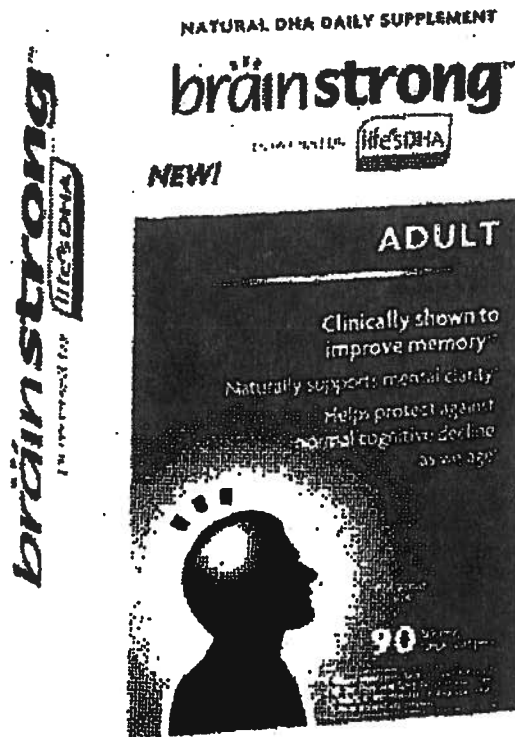
**brainstrong ADULT**

**CLINICALLY SHOWN TO IMPROVE MEMORY\*\***

13. Additionally, on the packaging of their BrainStrong products I-Health represents that BrainStrong is “Clinically shown to improve memory,” that it “[n]aturally supports mental clarity,” and “[h]elps protect against normal cognitive decline as we age.”

---

<sup>1</sup> Available at [http://www.brainstrongdha.com/products/brainstrong\\_adult](http://www.brainstrongdha.com/products/brainstrong_adult) (last accessed March 22, 2012).



14. Defendant's representations are false, misleading and deceptive.

15. I-Health represents that BrainStrong contains "life's DHA." Docosahexaenoic acid ("DHA") is a long-chain omega-3 fatty acid typically normally derived from fish oil. The DHA Defendant uses in BrainStrong is not derived from fish oil, but rather a type of DHA derived from fermented algae, or DHA algal oil. DHA from fermented algae does not support brain health.

16. Despite I-Health's claims that BrainStrong is "clinically shown to improve memory," there are no legitimate scientific studies that show DHA algal oil supplementation supports brain health. Indeed, I-Health fails to identify any study that shows DHA algal oil is effective in supporting brain health.

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**CLASS ACTION ALLEGATIONS**

17. Plaintiff brings this class action on behalf of herself and all others similarly situated as members of the proposed Class. The proposed Class, which Plaintiff seeks to represent, is comprised of all individuals who purchased I-Health BrainStrong in the United States (the "Class") since April 2011 (the "Class Period"). Excluded from the Class are Defendant, any entity in which Defendant has a controlling interest, and any of its subsidiaries, affiliates, and officers, directors of the entity Defendant, or employees, and any legal representative, heir, successor, or assignee of Defendant.

18. Plaintiff also seeks to represent a subclass defined as all members of the Class who purchased I-Health BrainStrong in New York during the Class Period ("the New York Subclass").

19. This action has been brought and may properly be maintained as a class action pursuant to *Federal Rules of Civil Procedure* Rule 23.

20. The members of the Class and New York Subclass are so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown to Plaintiff at this time and can only be ascertained through appropriate discovery, Plaintiff is informed and believes, and on that basis alleges, that hundreds of thousands of persons are members of the Class. The precise number of Class members and their addresses are unknown to Plaintiff. Class members may be notified of the pendency of this action by published and/or mailed notice.

21. This action presents questions of law and fact common to all members of the Class. These common questions predominate over the questions affecting only individual Class members.

22. The questions common to members of the Class are, *inter alia*:

- a) whether I-Health violated the Magnuson-Moss Act, 15 U.S.C. § 201, *et seq.*,
- b) whether I-Health was unjustly enriched by its conduct;

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- c) whether I-Health breached an express warranty made to Plaintiff and the Class;
- d) whether I-Health advertises, or markets BrainStrong in a way that is false or misleading;
- e) whether BrainStrong fails to conform to the representations, which were published, disseminated and advertised to Plaintiff and the Class;
- f) whether I-Health concealed from Plaintiff and the Class that BrainStrong did not conform to its stated representations;
- g) whether, by the misconduct set forth in this Complaint, I-Health has engaged in unfair, fraudulent or unlawful business practices with respect to the advertising, marketing and sales of BrainStrong;
- h) whether I-Health violated the New York General Business Law, § 349, *et seq.*;
- i) whether, as a result of I-Health's misconduct as alleged herein, Plaintiff and Class members are entitled to restitution, injunctive and/or monetary relief and, if so, the amount and nature of such relief.

23. Plaintiff's claims are typical of the claims of the members of the Class as all members of the Class are similarly affected by Defendant's wrongful conduct. Plaintiff has no interests antagonistic to the interests of the other members of the Class. Plaintiff and all members of the Class have sustained economic injury arising out of Defendant's violations of common and statutory law as alleged herein.

24. Plaintiff is an adequate representative of the Class because his interests do not conflict with the interests of the members of the Class he seeks to represent; he has retained counsel competent and experienced in complex class action litigation; and he intends to prosecute

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this action vigorously. The interests of members of the Class will be fairly and adequately protected by Plaintiff and his counsel.

25. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impracticable. Furthermore, as the damages suffered by individual Class members may be relatively small, the expense and burden of individual litigation make it impossible for members of the Class to individually redress the wrongs done to them. There will be no difficulty in the management of this class action. Individualized litigation presents the potential for inconsistent or contradictory judgments. A class action presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

**COUNT 1**

**(Violation of Magnuson-Moss Act (15 U.S.C. § 2301, *et seq.*))**

26. Plaintiff and Class members reallege and incorporate by reference each allegation set forth above and further allege as follows.

27. Plaintiff bring this claim individually and on behalf of the members of the Class against defendant I-Health.

28. BrainStrong is a consumer product as defined in 15 U.S.C. §2301(1).

29. Plaintiff and Class members are consumers as defined in 15 U.S.C. §2301(3).

30. Defendant I-Health is a supplier and warrantor as defined in 15 U.S.C. §2301(4) and (5).

31. In connection with the sale of BrainStrong, I-Health issued written warranties as defined in 15 U.S.C. §2301(6), which warranted that BrainStrong is "clinically shown to improve

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memory,” “naturally supports mental clarity,” and “helps protect against normal cognitive decline.”

32. By reason of I-Health’s breach of its express written warranties stating that BrainStrong is “clinically shown to improve memory,” “naturally supports mental clarity,” and “helps protect against normal cognitive decline,” I-Health has violated the statutory rights due Plaintiff and Class members pursuant to the Magnuson-Moss Warranty Act, 15 U.S.C. §2301 *et seq.*, thereby damaging Plaintiff and Class members.

### COUNT 2

#### (Unjust Enrichment)

33. Plaintiff and Class members reallege and incorporate by reference each allegation set forth above and further allege as follows.

34. Plaintiff brings this claim individually and on behalf of the members of the Class and New York Subclass against defendant I-Health.

35. Plaintiff and Class members conferred a benefit on I-Health by purchasing BrainStrong.

36. I-Health has been unjustly enriched in retaining the revenues derived from Class members’ purchases of BrainStrong, which retention under these circumstances is unjust and inequitable because I-Health misrepresented that BrainStrong is “clinically shown to improve memory,” “naturally supports mental clarity,” and “helps protect against normal cognitive decline,” when in fact there is no scientific basis for I-Health’s claims of efficacy, which caused injuries to Plaintiff and Class members because: (a) they would not have purchased BrainStrong on the same terms if the true facts concerning their actual composition had been known; and (b) they paid a price premium due to the misrepresentations concerning BrainStrong.

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37. Because I-Health's retention of the non-gratuitous benefit conferred on it by Plaintiff and Class members is unjust and inequitable, I-Health must pay restitution to Plaintiff and the Class members for its unjust enrichment, as ordered by the Court.

**COUNT 3**

**(For Breach of Express Warranty)**

38. Plaintiff and Class members reallege and incorporate by reference each allegation set forth above and further allege as follows.

39. Plaintiff brings this claim on behalf of the nationwide Class under New York law, and on behalf of New York Subclass under New York law.

40. I-Health, as the designer, manufacturer, marketer, distributor, or seller expressly warranted BrainStrong was "clinically shown to improve memory," "naturally supports mental clarity," and "helps protect against normal cognitive decline."

41. In fact, I-Health's claims of the benefits of BrainStrong are not supported by science. BrainStrong does not possess the quality, health benefits or value represented and warranted by I-Health.

42. Plaintiff and Class Members were injured as a direct and proximate result of I-Health's breach because: (a) they would not have purchased BrainStrong on the same terms if the true facts regarding the lack of a legitimate scientific basis for Defendant's claims; (b) they paid a price premium due to the misrepresentations of BrainStrong; and (c) BrainStrong did not have the quality, health benefits or value as promised.

**COUNT 4**

**(Intentional Misrepresentation)**

43. Plaintiff and Class members reallege and incorporate by reference each allegation set forth above and further allege as follows.

44. Plaintiff brings this claim on behalf of the nationwide Class under New York law, and on behalf of the New York Subclass under New York law.

45. At all times herein referred to, I-Health was engaged in the business of designing, processing, marketing, distributing, or selling BrainStrong which are the subject of the present litigation.

46. I-Health, acting through its officers, agents, servants, representatives, or employees, delivered BrainStrong to retail stores, distributors, and various other distribution channels.

47. I-Health willfully, falsely, and knowingly misrepresented material facts relating to the character and quality BrainStrong. These misrepresentations were contained in I-Health's website, advertising product brochures, packaging, product inserts, product descriptions and other marketing materials disseminated or caused to be disseminated by I-Health, and such misrepresentations were reiterated and disseminated by officers, agents, representatives, servants, or employees of I-Health, acting within the line and scope of their authority, so employed by I-Health to merchandise and market the product.

48. I-Health's representations were made with the intent that the general public, including Plaintiff and Class members, would rely upon them. I-Health's representations were made with knowledge of the falsity of such statements, or in reckless disregard of the truth thereof.

49. In actual and reasonable reliance upon I-Health's misrepresentations, Plaintiff and Class members purchased BrainStrong for their intended and reasonably foreseeable purposes. Plaintiff and Class members were unaware of the existence of facts that I-Health suppressed and failed to disclose. If they had been aware of the suppressed facts, Plaintiff and Class members would not have purchased BrainStrong.

50. Plaintiff and Class members are informed and believe, and thereon allege, that I-Health misrepresented material facts with the intent to defraud Plaintiff and Class members. Plaintiff and Class members were unaware of the intent of I-Health and relied upon the representations of I-Health in deciding to purchase BrainStrong.

51. Plaintiff's and Class members' reliance on the representations of I-Health was reasonable.

52. In actual and reasonable reliance upon I-Health's misrepresentations, Plaintiff and Class members purchased BrainStrong, the direct and proximate result of which was injury and harm to the Plaintiff and Class members because: a) they would not have purchased BrainStrong on the same terms, had they known the true facts regarding the lack of a legitimate scientific basis for Defendant's claims; (b) they paid a price premium due to the misrepresentations of I-Health regarding BrainStrong; and (c) BrainStrong did not have the quality, health benefits or value as promised.

**COUNT 5**

**(Fraudulent Concealment / Nondisclosure)**

53. Plaintiff and Class members reallege and incorporate by reference each allegation set forth above and further allege as follows.

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54. Plaintiff brings this claim on behalf of the nationwide Class under New York law, and on behalf of the New York Subclass under New York law.

55. I-Health knew at the time of sale that there was no legitimate scientific basis for I-Health's claims concerning the efficacy of its BrainStrong.

56. I-Health fraudulently concealed from and/or intentionally failed to disclose to Plaintiff, the Class, and all others in the chain of distribution (e.g., concealments and omissions in I-Health's communications with wholesalers, retailers, and others in the chain of distribution that were ultimately passed on to Plaintiff and the Class) that there was no legitimate scientific basis for I-Health's claims concerning the efficacy of BrainStrong.

57. I-Health had exclusive knowledge that there was no legitimate scientific basis for I-Health's claims concerning the efficacy of BrainStrong and that it would not be anticipated that consumers, wholesalers or retailers would conduct independent tests on BrainStrong to determine efficacy. The defect, i.e., the lack of scientific support I-Health's BrainStrong efficacy, is latent and not something that Plaintiff or Class members could, in the exercise of reasonable diligence, have discovered independently prior to purchase, because it is not feasible for individual consumers to conduct their own laboratory analysis of BrainStrong prior to purchase.

58. I-Health had the capacity to, and did deceive consumers into believing that the products they were purchasing "clinically shown to improve memory," "naturally supports mental clarity," and "helps protect against normal cognitive decline."

59. I-Health undertook active and ongoing steps to conceal the lack of a legitimate scientific basis for I-Health's claims concerning the efficacy of BrainStrong. Plaintiff is aware of nothing in I-Health's advertising, publicity or marketing materials that discloses the truth about



lack of a legitimate scientific basis for I-Health's claims concerning the efficacy of BrainStrong, despite I-Health's awareness of the problem.

60. The facts concealed and/or not disclosed by I-Health to Plaintiff and the Class are material facts in that a reasonable person would have considered them important in deciding whether to purchase (or to pay the same price for) BrainStrong.

61. Since I-Health elected to make representations regarding the efficacy of BrainStrong, i.e., that it was "clinically shown to improve memory," "naturally supports mental clarity," and "helps protect against normal cognitive decline," I-Health had a duty to accurately disclose the lack of a legitimate scientific basis for I-Health's claims concerning the efficacy of BrainStrong in its marketing, advertising and at the time of sale.

62. I-Health intentionally concealed and/or failed to disclose the lack of a legitimate scientific basis for I-Health's claims concerning the efficacy of BrainStrong for the purpose of inducing the Plaintiff and the Class to act thereon.

63. Plaintiff and the Class justifiably acted or relied upon the concealed and/or non-disclosed facts to their detriment, as evidenced by their purchase of BrainStrong.

64. Had Plaintiff and the Class known of the lack of a legitimate scientific basis for I-Health's claims concerning the efficacy of BrainStrong they would not have purchased (or would have paid less for) BrainStrong.

#### **COUNT 6**

#### **(Violation Of New York General Business Law § 349)**

65. Plaintiff and Class members reallege and incorporate by reference each allegation set forth above and further allege as follows.

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66. Plaintiff brings this claim on behalf of the New York Subclass under New York law.

67. I-Health engaged in making false and misleading marketing and advertising claims, representing that BrainStrong was "clinically shown to improve memory," "naturally supports mental clarity," and "helps protect against normal cognitive decline," when in fact these claims lack legitimate scientific basis concerning the efficacy of BrainStrong.

68. As set for above, by advertising, marketing, distributing and/or selling BrainStrong to Plaintiff and the New York Subclass, I-Health engaged in, and continues to engage in, deceptive acts and practices.

69. Plaintiff and other members of the New York Subclass further seek to enjoin such unlawful deceptive acts and practices as described above. Each of the members of the New York Subclass will be irreparably harmed unless the unlawful actions of I-Health are enjoined in that I-Health will continue to falsely and misleadingly advertise BrainStrong as being "clinically shown to improve memory," "naturally supports mental clarity," and "helps protect against normal cognitive decline." Therefore, Plaintiff and the New York Subclass request an order granting them injunctive relief ordering appropriate disclosures and/or disclaimers in the advertising, marketing and promotion of BrainStrong.

70. Absent such injunctive relief, I-Health will continue to advertise, market and sell BrainStrong as "clinically shown to improve memory," "naturally supports mental clarity," and "helps protect against normal cognitive decline," even though there is no legitimate scientific basis for I-Health's claims concerning the efficacy of BrainStrong, to the detriment of consumers.

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71. In this regard, I-Health has violated, and continue to violate, G.B.L. § 349, which makes deceptive acts and practices unlawful. As a direct and proximate result of I-Health's violation of G.B.L. § 349 as alleged above, Plaintiff and other members of the New York Subclass have suffered damages, in an amount to be determined at trial.

**COUNT 7**

**(Violation Of New York General Business Law § 350)**

72. Plaintiff and Class members reallege and incorporate by reference each allegation set forth above and further allege as follows.

73. Plaintiff brings this claim on behalf of the New York Subclass under New York law.

74. I-Health engaged in making false and misleading marketing and advertising claims, representing that BrainStrong was "clinically shown to improve memory," "naturally supports mental clarity," and "helps protect against normal cognitive decline," when in fact these claims lack legitimate scientific basis concerning the efficacy of BrainStrong.

75. New York G.B.L. § 350-a defines "false advertising" as "advertising, including labeling, of a commodity, or of the kind, character, terms or conditions of any employment opportunity if such advertising is misleading in a material respect."

76. As set for above, by advertising, marketing, distributing and/or selling BrainStrong to Plaintiff and the New York Subclass, I-Health engaged in, and continues to engage in, false advertising.

77. Plaintiff and other members of the New York Subclass further seek to enjoin such false advertising as described above. Each of the members of the New York Subclass will be irreparably harmed unless the unlawful actions of I-Health are enjoined in that I-Health will

continue to falsely and misleadingly advertise and market BrainStrong as “clinically shown to improve memory,” “naturally supports mental clarity,” and “helps protect against normal cognitive decline.” Therefore, Plaintiff and the New York Subclass request an order granting them injunctive relief ordering appropriate disclosures and/or disclaimers in the advertising, marketing and promotion of BrainStrong.

78. Absent such injunctive relief, I-Health will continue to advertise, market and sell BrainStrong as “clinically shown to improve memory”, “naturally supports mental clarity” and “helps protect against normal cognitive decline,” even though there is no legitimate scientific basis for I-Health’s claims concerning the efficacy of BrainStrong, to the detriment of consumers.

79. In this regard, I-Health has violated, and continue to violate, G.B.L. § 350, which makes deceptive acts and practices unlawful. As a direct and proximate result of I-Health’s violation of G.B.L. § 350 as alleged above, Plaintiff and other members of the New York Subclass have suffered damages, in an amount to be determined at trial.

**WHEREFORE**, Plaintiff, individually and on behalf of all others similarly situated, seeks judgment against I-Health, as follows:

A. For an order certifying the nationwide Class and the New York Subclass under Rule 23 of the Federal Rules of Civil Procedure and naming Plaintiff as Class Representatives and Plaintiff’s attorneys as Class Counsel to represent the Class members;

B. For an order declaring that I-Health’s conduct violates the statutes referenced herein;

C. For an order finding in favor of the Plaintiff, the nationwide Class and the New York Subclass on all counts asserted herein;



- D. For an order awarding compensatory, treble, and punitive damages in amounts to be determined by the Court and/or jury;
- E. For prejudgment interest on all amounts awarded;
- F. For an order of restitution and all other forms of equitable monetary relief;
- G. For injunctive relief as pleaded or as the Court may deem proper; and
- H. For an order awarding Plaintiff and the Class and subclasses their reasonable attorneys' fees and expenses and costs of suit.

**JURY DEMANDED**

Plaintiff hereby demands a trial by jury.

DATED: March 27, 2012

Respectfully submitted,

By: 

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*Attorneys for Plaintiff*



SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 311

HON. JOHN SHEPARD WILEY JR., JUDGE

AMY JOVEL,

PLAINTIFF,

VS.

I-HEALTH, INC.,

DEFENDANT.

CASE NO. BC 481048

REPORTER'S TRANSCRIPT OF PROCEEDINGS

FRIDAY, MAY 25, 2012

APPEARANCES:

FOR THE PLAINTIFF:  
(VIA COURTCALL)

BONNETT, FAIRBOURN, FRIEDMAN &  
BALINT  
BY: PATRICIA N. SYVERSON, ESQ.  
2901 NORTH CENTRAL AVENUE  
SUITE 1000  
PHOENIX, ARIZONA 85012  
(602) 274-1100

FOR THE DEFENDANT:

HOGAN, LOVELLS  
BY: ROBERT B. HAWK, ESQ.  
525 UNIVERSITY AVENUE  
4TH FLOOR  
PALO ALTO, CALIFORNIA 94301  
(650) 463-4000

LINDA L. COMSTOCK, CSR NO. 3741  
OFFICIAL REPORTER

ORIGINAL

Exh. A  
100

1 LOS ANGELES, CALIFORNIA; FRIDAY, MAY 25, 2012; 8:35 A.M.

2 DEPARTMENT NO. 311 HON. JOHN SHEPARD WILEY JR., JUDGE

3  
4 THE COURT: I think the sensible thing is to go to -- is  
5 it Jovel or Jovel (pronouncing)?

6 MR. HAWK: Your Honor, I believe it's Jovel.

7 THE COURT: Jovel. That's number three on the calendar.  
8 That's Jovel versus I-Health.

9 Let's get appearances when everyone is able to be  
10 seated.

11 I think on the telephone, we might have Patricia --  
12 is it Syverson?

13 MS. SYVERSON: Yes, it is. Good morning, Your Honor.

14 THE COURT: And in court we have --

15 MR. HAWK: Robert Hawk from Hogan, Lovells, Your Honor,  
16 for defendant I-Health.

17 THE COURT: Good morning, everybody. Do have a seat and  
18 be comfortable, please.

19 Thank you for your status reports May 18th and  
20 May 21st from the defense and the plaintiff, respectively.

21 It seems to me that the sensible thing to do here is  
22 to resolve this issue of a stay, given that there's a New York  
23 action pending that may or may not be relevant for stay  
24 purposes.

25 Does the plaintiff have any disagreement that that's  
26 the logical first step?

27 MS. SYVERSON: Well, we actually believe that a stay is  
28 not appropriate in this action, a stay of our action. If



1       there was a stay at all, it would be of the New York action.

2           THE COURT: Right. So you understand the defense is  
3       urging a stay so I need to make a decision on that; right?

4           MS. SYVERSON: Yes.

5           THE COURT: Right. So I guess you agree with me that the  
6       first step we ought to take is to set that motion for hearing.

7           MS. SYVERSON: Yes. We agree.

8           THE COURT: And the defense agrees.

9           MR. HAWK: Yes, Your Honor.

10          THE COURT: Counsel, this case is close to settlement.  
11       Let's keep our momentum going here.

12                 Now, this will be a defense motion. Have you  
13       conferred with the plaintiff about a briefing schedule?

14          MR. HAWK: We have not, Your Honor.

15          THE COURT: Let me encourage the parties before you come  
16       to court to talk over what you want to accomplish that day and  
17       to see if there's agreement; and if there's agreement, spell  
18       out the agreement, including briefing deadlines and hearing  
19       dates, present it to me as a fait accompli, and I will predict  
20       that I'll agree with you.

21                 So, counsel, it's a pleasure to work with you. Let  
22       me serve you in every way I can. Let me ask you to tell me  
23       how I can make all of your dreams come true. It sounds like  
24       the first step in that process now is this motion. Let's go  
25       off the record, if that's agreeable, just to discuss  
26       calendaring matters.

27                 Is that all right with the plaintiff?

28          MS. SYVERSON: Yes, it is.

Exh. A

1 MR. HAWK: Yes, Your Honor. That's fine.

2 THE COURT: So we're off the record here.

3 (Discussion off the record.)

4 THE COURT: So we've been off the record talking about  
5 scheduling and communication and other procedural matters.

6 Now we have a substantive issue. The plaintiff is  
7 proposing a second amended complaint. It seems to me that the  
8 second amended complaint would be pertinent to the motion to  
9 stay; so how far along in your contemplation are you? Have  
10 you got the thing drafted?

11 MS. SYVERSON: We could file it on Tuesday.

12 THE COURT: I think that would be sensible because then  
13 your colleague would have a current target and probably you  
14 would want the advantage of the most recent version of your  
15 pleadings for your arguments as well; right?

16 MS. SYVERSON: Yes. I agree.

17 THE COURT: So any response there?

18 MR. HAWK: Only, Your Honor, I understand that, you know,  
19 what the standard is for amending is a very liberal standard,  
20 and the only thing I would raise is that they've -- the  
21 plaintiffs in this case have taken their sort of one free  
22 without-cause amendment. I guess all I -- and I -- I'm  
23 confident that we would stipulate to the amendment but I  
24 would -- I would like to see what the complaint is before I  
25 stipulate and I would -- I would like to just know why the  
26 amendment is being made at this point. That's all. Just a  
27 statement to that effect, if --

28 THE COURT: Well, this might be the right time to

1 communicate by message board. So what I'll do is I'll set a  
2 hearing date. The defense requests are certainly reasonable.  
3 You have no right on a second amended complaint to demand that  
4 they stipulate to it. The defense posture is also extremely  
5 reasonable. The chances of winning a motion to oppose an  
6 amendment when we've just gotten together for our first  
7 hearing today, under California appellate law, is -- that  
8 would be an heroic motion. Nonetheless, I'd like to underline  
9 how important courtesies are, ordinary observance of the  
10 golden rule. If your colleague is going to ask you for a  
11 favor, it's reasonable to explain why it is you want the favor  
12 and what might be asked in return.

13 So I'm not going to have that conversation going on  
14 the record. That's just a matter of working with opposing  
15 counsel off the record and on the phone. I'll set a date that  
16 can go off calendar if everybody's happy with the proposal.  
17 Should I set, what, in a week, say, a further case management  
18 conference? Would the plaintiff say this would be a sensible  
19 idea next Friday?

20 MS. SYVERSON: Yes. Okay.

21 THE COURT: We'll put that at 8:30.

22 Now, I fully expect this 8:30 hearing to go straight  
23 off calendar. Just let us know about that. Phone either  
24 Ms. Mata or Ms. Bivins here in 311 and tell us that nothing is  
25 coming in terms of hearing that date, and we'll just go on to  
26 the July hearing date then. But our default right now is a  
27 June 29th, 8:30, hearing.

28 Notice is waived on that score and all other scores

1 as well; correct?

2 MS. SYVERSON: Yes.

3 THE COURT: Notice is waived?

4 MR. HAWK: Yes. Notice is waived. Yes, Your Honor.  
5 June 1st will be -- what's on calendar?

6 THE COURT: June 1st. Yes. I meant to say June 1st. My  
7 error. Do forgive me, please.

8 Now, June 1st is a red letter date or more like a  
9 black letter day in Department 311. It is our last day for  
10 our court reporter. All the court reporters in the civil  
11 division are being laid off or, if they're sufficiently  
12 senior, moved to some other assignment out of civil. We're  
13 going to have no full time civil court reporters.

14 So from June 1st on, if you want our hearing  
15 transcribed, you're going to have to arrange for that  
16 yourself. There's some interim partial, very part-time court  
17 reporting that will be done one morning and one afternoon, but  
18 I'm not setting hearings on that basis. I'm just asking you  
19 to be prepared. If you want it reported, handle it yourself.  
20 I apologize. I wish California right now had another 16  
21 billion dollars and we wouldn't have this problem, but we  
22 don't and we do.

23 So there's a page right there that all counsel who  
24 are physically in the room might want to just pick up. That's  
25 not a court-endorsed program, but it's for your information.

26 Would you mind scanning that or faxing that to your  
27 colleague?

28 MR. HAWK: Yes, Your Honor. Sure. Glad to.



1 THE COURT: This isn't notice but it's the same  
2 information about court reporting alternatives that the  
3 defense has got. Is that all right, from the plaintiff's  
4 point of view, that we proceed that way?

5 MS. SYVERSON: Yes. Thank you.

6 THE COURT: All right. I think we've got the waterfront  
7 covered as far as I'm concerned.

8 How may I be of service to you? Let's start with  
9 the plaintiff and go to the defendant.

10 MS. SYVERSON: I think we're good at this point.

11 THE COURT: Good.

12 MR. HAWK: Yes, Your Honor. We are good. Thank you very  
13 much.

14 THE COURT: All right. Now, in your briefing, please lay  
15 out how we should proceed at what will be also a case  
16 management conference. So, obviously, whether the stay is  
17 granted or not will affect your plans, but give me some idea  
18 of how you think things should proceed in both alternatives.

19 Now, I'm assuming that the -- there's going to be a  
20 stipulation to allow the filing of the second amended  
21 complaint and that there would be no obligation on the defense  
22 to demur or to answer within any period of time.

23 MR. HAWK: I was going to raise that, Your Honor. I  
24 should have raised that.

25 THE COURT: No. A concomitant of the idea of we're  
26 talking about a possible stay is that the plaintiff wants to  
27 take that step but that wouldn't trigger a time clock on the  
28 defense.

1           The plaintiff thinks that's a sensible approach?

2           MS. SYVERSON: Yes. I think so.

3           THE COURT: Yes. I mean until we decide whether there's  
4 a stay, let's just have a standstill, except for this second  
5 amended complaint and this briefing.

6           All right, then. Notice is waived.

7           Counsel, thank you so much. I look forward to  
8 working with you both.

9           MR. HAWK: Thank you, Your Honor.

10          MS. SYVERSON: Thank you, Your Honor.

11          MR. HAWK: It's a pleasure.

12          THE COURT: Good-bye.

13                 (Proceedings in the above-entitled matter  
14 were concluded.)

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 311

HON. JOHN SHEPARD WILEY JR., JUDGE

AMY JOVEL,

PLAINTIFF,

VS.

I-HEALTH, INC.,

DEFENDANT.

CASE NO. BC 481048

REPORTER'S CERTIFICATE

I, LINDA L. COMSTOCK, OFFICIAL REPORTER OF THE  
SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS  
ANGELES, DO HEREBY CERTIFY THAT THE FOREGOING PAGES, 1 THROUGH  
8, INCLUSIVE, COMPRISE A FULL, TRUE AND CORRECT TRANSCRIPT OF  
THE PROCEEDINGS HELD IN THE ABOVE-ENTITLED MATTER ON MAY 25,  
2012.

DATED THIS 1ST DAY OF JUNE, 2012.

  
CSR NO. 3741  
OFFICIAL REPORTER





1 BONNETT, FAIRBOURN, FRIEDMAN  
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6 tcarpenter@bffb.com  
7 Telephone: (619) 756-6978

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 COUNTY OF LOS ANGELES

10 AMY JOVEL, On Behalf of Herself and  
11 All Others Similarly Situated,

12 Plaintiff,

13 v.

14 I-HEALTH, INC., a Delaware  
15 Corporation

16 Defendant.

Case No.: BC481048

**STIPULATION AND [PROPOSED]  
ORDER TO FILE SECOND AMENDED  
COMPLAINT**

17 WHEREAS, on May 25, 2012, at the initial status conference, the parties discussed  
18 Plaintiff's desire to amend her complaint to alleged multi-state consumer fraud and breach of  
19 express warranty claims;

20 WHEREAS, after the initial status conference Plaintiff prepared a proposed Second  
21 Amended Complaint, attached hereto as Exhibit A, which includes multi-state consumer fraud  
22 and breach of express warranty claims;

23 WHEREAS, Plaintiff provided Defendant with an advanced draft of the proposed Second  
24 Amended Complaint; and

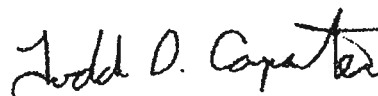
25 WHEREAS, the parties met and conferred on the Second Amended Complaint and  
26 Defendant does not object to the Court granting Plaintiff leave to file the proposed Second  
27 Amended Complaint.

1 NOW THEREFORE Plaintiff requests (and Defendant does not oppose that request) that  
2 the Court grant leave to Plaintiff to file the proposed Second Amended Complaint.

3 IT IS SO STIPULATED

4 Dated: May 30, 2012

5 BONNETT, FAIRBOURN, FRIEDMAN  
6 & BALINT, P.C.

7 

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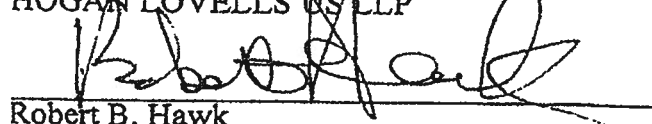
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Todd D. Carpenter

9 Attorneys for Plaintiff  
AMY JOVEL

10 Dated: May 30, 2012

11 HOGAN LOVELLS US LLP

12   
13 

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Robert B. Hawk

14 Attorneys for Defendant  
15 I-HEALTH, INC.

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Ex. A

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ORDER

In light of the foregoing stipulation, leave to file the Second Amended Complaint is GRANTED and the Second Amended Complaint shall be deemed filed on the date of this Order.

IT IS SO ORDERED.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge  
Superior Court of the State of California  
County of Los Angeles

Eph.A  
///

## EXHIBIT A

Ex. A  
112



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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF LOS ANGELES

AMY JOVEL, On Behalf of Herself and  
All Others Similarly Situated,

Plaintiff,

v.

I-HEALTH, INC., a Delaware  
Corporation

Defendant.

Case No.: BC481048

**SECOND AMENDED CLASS ACTION  
COMPLAINT FOR:**

1. VIOLATION OF THE UNFAIR  
COMPETITION LAW, Business and  
Professions Code §17200 *et seq.*;
2. VIOLATION OF THE CONSUMERS  
LEGAL REMEDIES ACT,  
Civil Code §1750 *et seq.*; and
3. BREACH OF EXPRESS  
WARRANTY.

DEMAND FOR JURY TRIAL

Exh. A  
113

1 Plaintiff Amy Jovel brings this action on behalf of herself and all others similarly  
2 situated against Defendant I-Health, Inc. and states:

3 **NATURE OF ACTION**

4 1. Defendant manufactures, markets, sells and distributes BrainStrong, a line  
5 of four dietary supplements fortified with highly processed fermented algae.<sup>1</sup> Through an  
6 extensive, widespread, comprehensive and uniform nationwide marketing campaign,  
7 Defendant claims that taking its BrainStrong products will support brain health. On each  
8 and every BrainStrong Toddler and Kids package, where it cannot be missed by  
9 consumers, Defendant prominently states that BrainStrong "Supports brain development  
10 and function". Similarly, on each and every BrainStrong Adult package, Defendant  
11 represents that the product is "clinically shown to improve memory", "naturally supports  
12 mental clarity" and "helps protect against normal cognitive decline" (hereinafter "the  
13 brain health representations"). The brain health representations appear prominently on the  
14 front of each and every BrainStrong box.

15 2. In truth, the BrainStrong products do not support brain health in children or  
16 adults. Clinical cause and effect studies have consistently found no causative link  
17 between DHA algal oil supplementation and brain health. Defendant's representations are  
18 false, misleading, and reasonably likely to deceive the public.

19 3. Defendant has employed numerous methods to convey its uniform,  
20 deceptive brain health representations to consumers, starting with the Products'  
21 "BrainStrong" name, its website and in its online and print promotional materials and,  
22 importantly, prominently on the front and center of the Products' packaging where the  
23 brain health representations cannot be missed by consumers. The only reason a consumer  
24 would purchase BrainStrong is to obtain the advertised brain health benefits, which are the

25 <sup>1</sup> These products include: (1) BrainStrong Prenatal; (2) BrainStrong Toddler; (3) BrainStrong  
26 Kids; and (4) BrainStrong Adults. This lawsuit concerns only three of the products --  
27 BrainStrong Toddler, BrainStrong Kids and BrainStrong Adults (collectively "BrainStrong" or  
28 "the Products").

1 only represented benefits and which the Products do not provide.

2 4. As a result of Defendant's deceptive brain health representations, consumers  
3 – including Plaintiff and members of the proposed Class – have purchased Products that  
4 do not perform as advertised.

5 5. Plaintiff brings this action on behalf of herself and other similarly situated  
6 consumers who have purchased BrainStrong to halt the dissemination of this false,  
7 misleading and deceptive advertising message, correct the false and misleading perception  
8 it has created in the minds of consumers, and obtain redress for those who have purchased  
9 the Products. Based on violations of state unfair competition laws (detailed below) and  
10 breach of express warranties, Plaintiff seeks injunctive and monetary relief for consumers  
11 who purchased BrainStrong.

#### 12 JURISDICTION AND VENUE

13 6. This Court has jurisdiction over Defendant and the claims set forth below  
14 pursuant to Code of Civil Procedure §410.10 and the California Constitution, Article VI  
15 §10, because this case is a cause not given by statute to other trial courts.

16 7. This Court has jurisdiction over Defendant because it is a corporation that  
17 does substantial business in California, including Los Angeles County. Defendant  
18 promotes, markets, distributes and sells BrainStrong in Los Angeles County, causing  
19 Defendant to incur both obligations and liabilities in Los Angeles County.

20 8. The amount in controversy requirement exceeds the jurisdiction minimum  
21 of this Court.

22 9. Venue is proper in Los Angeles County because Defendant systemically and  
23 continuously transacts business in Los Angeles County California and the transactions  
24 with Plaintiff took place in Los Angeles County, California

#### 25 PARTIES

26 10. Plaintiff Amy Jovel resides in Los Angeles County, California. In or around

27 EWE, A  
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- 3 -  
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1 December 2011, Plaintiff Jovel purchased one box of BrainStrong Kids from a Wal-Mart  
 2 in Los Angeles, California. Prior to purchasing BrainStrong Kids, Plaintiff Jovel was  
 3 exposed to and saw Defendant's advertisements claiming that the Products support brain  
 4 health in adults and children. Prior to purchasing the Product, Plaintiff also read the  
 5 BrainStrong Kids label reaffirming the claims she saw in the advertisements. Relying on  
 6 these claims, Plaintiff Jovel purchased BrainStrong Kids, believing the Product supported  
 7 brain health. She paid approximately \$15 for the Product. Plaintiff gave the Product to  
 8 her daughter as directed. The BrainStrong Kids product Plaintiff purchased does not  
 9 support brain health as represented. As a result, Plaintiff suffered injury in fact and lost  
 10 money. Had Plaintiff known the truth about Defendant's misrepresentations and  
 11 omissions, she would not have purchased BrainStrong Kids.

12 11. Defendant I-Health, Inc ("I-Health") is a corporation organized and existing  
 13 under the laws of the state of Delaware. I-Health's headquarters is at 55 Sebeth Drive,  
 14 Suite 102, Cromwell, Connecticut 06416. Defendant I-Health manufactured, advertised,  
 15 marketed, distributed and sold the BrainStrong products throughout the United States,  
 16 including California.

## 17 **FACTUAL ALLEGATIONS**

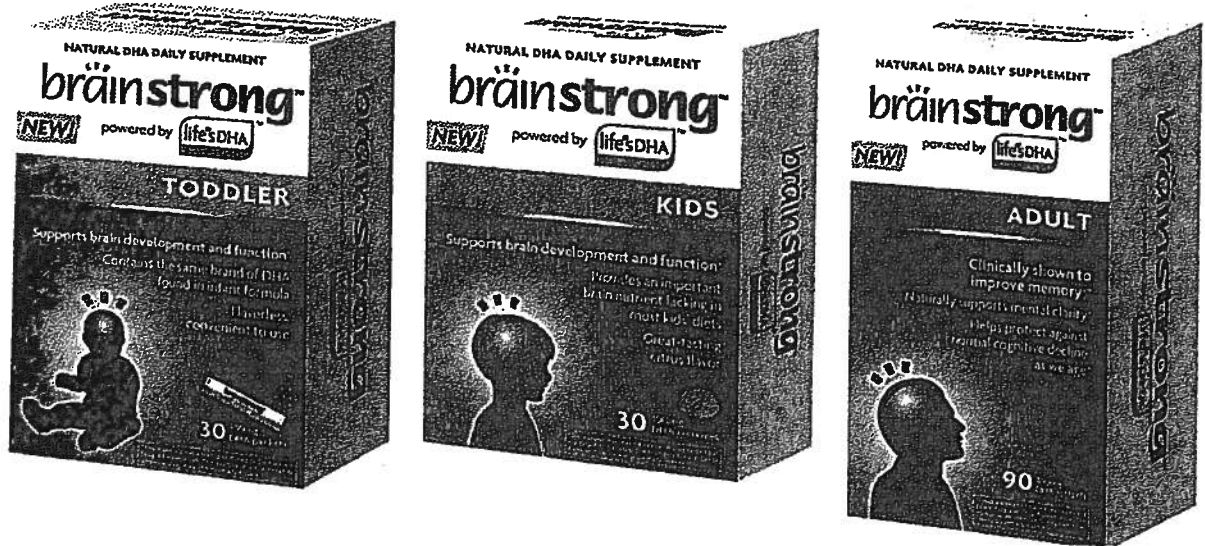
### 18 ***The BrainStrong Products***

19 12. Since April 2011, Defendant has manufactured, distributed, marketed and  
 20 sold its BrainStrong products throughout the United States, including California. This  
 21 lawsuit concerns three of those products: (1) BrainStrong Toddler; (2) BrainStrong Kids;  
 22 (3) and BrainStrong Adults.

23 13. Defendant's BrainStrong products are sold in virtually every major food,  
 24 drug, and mass retail outlet in the country. The Products retail for approximately \$15-  
 25 \$30. The following are screen shots of the Products:

26  
 27 *Exh. A*  
 116  
 - 4 -  
 28





14. Since the Products' launch, Defendant has consistently conveyed the message to consumers throughout California that its BrainStrong products provide an essential daily supplement fortified with DHA algal oil that "supports brain health and function" in children and adults. They do not. Defendant's brain health representations are false, misleading and deceptive.

15. All three BrainStrong products contain "life's DHA". DHA is a long-chain omega-3 fatty acid typically found in cold water fish. The DHA in Defendant's BrainStrong products is not derived from fish oil. Instead, the DHA oil in Defendant's products is an immature short-chain omega-3 fatty acid made from an extract of mutated and fermented algae. Contrary to Defendant's representations made on each and every Product package, DHA algal oil does not support brain health.

16. There are no competent and reliable scientific studies that DHA algal oil supplementation supports brain health. The one and only "reference" appearing on any of the Products is on the BrainStrong Adult label, purportedly supporting Defendant's "clinically shown to improve memory" representation. But, no identifying information is included with the "reference" to enable consumers to locate and review the "reference". The "reference" is not competent and reliable scientific support for Defendant's brain

1 health representation.

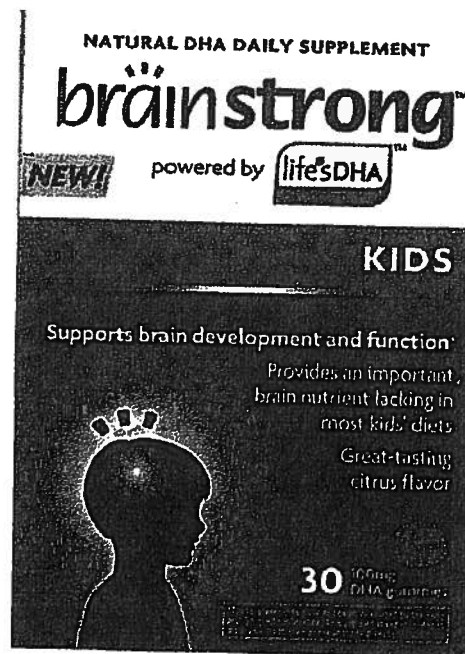
2 17. In truth, clinical cause and effect studies establish that Defendant's brain  
3 health representations are deceptive. For example, in Kirby, A., et al., *A Double-Blind,*  
4 *Placebo-Controlled Study Investigating the Effects of Omega-3 Supplementation in*  
5 *Children Aged 8-10 Years from a Mainstream School Population*, 31(3) *Research in*  
6 *Developmental Disabilities* 718-30 (2010), the study authors examined the effects of fish  
7 oil DHA supplementation on 450 students (ages 8-10 years old) for 16 weeks. *Id.* at 720.  
8 The study authors found that despite the wide range of cognitive and behavior outcomes  
9 used, DHA supplementation resulted in no significant differences in cognitive results:  
10 "very few significant differences between the supplemented and placebo group on the  
11 learning and performance measures used." *Id.* at 729.

12 18. Similarly, a 2008 study funded by Martek Biosciences, the manufacturers of  
13 the Life's DHA in the Products, concluded that there was no statistically significant  
14 difference between the DHA and placebo group in cognitive function. *See* Ryan, A., et  
15 al., *Assessing the Effect of Docosahexaemoic Acid on Cognitive Functions in Healthy*  
16 *Preschool Children*, 47(4) *Clin. Pediatr.* 355-62 (2008) (the Ryan Study).<sup>2</sup> *See also*  
17 Eilander, A., et al., *Effects of n-3 long chain polyunsaturated fatty acid supplementation*  
18 *on visual and cognitive development throughout childhood: a review of human studies*,  
19 76(4) *J. Prostaglandins, Leukotrienes and Essential Fatty Acids* 189-203 (Apr. 2007)  
20 ("Evidence for benefits of n-3 LCPUFA on cognitive development in healthy children  
21 older than 2 years of age is too limited to allow a clear conclusion.").

22 19. These and other competent and reliable scientific studies have found no  
23 cause and effect relationship between intake of dietary supplements with DHA algal oil  
24 and cognitive development. Defendant's brain health representations are false and  
25 misleading and reasonably likely to deceive the average consumer.

26  
27 <sup>2</sup> This study examined 175 4-year old children who received either 400 mg/d of DHA derived  
from the microalgae *Schizochytrium* spp or a placebo in capsules for 4 months.

20. Despite the lack of any competent and reliable scientific evidence that DHA algal oil supplementation supports brain health and the overwhelming evidence that it does not, each and every Product package repeatedly emphasizes that the BrainStrong products support brain health. Each and every consumer who purchases the Products is exposed to these deceptive brain health representations, which appear prominently and conspicuously on the front of the Products' packaging:



21. And, the entire backside panel is dedicated to promoting the DHA algal oil in Defendant's Products and its purported ability to support brain health:

**Give your child a "vitamin" for their brain every day!**

The school-age years bring a whole new set of challenges for young children. Ensuring that they get the proper amount of rest and eat a healthy diet is key. Supplementing their diet with DHA, an Omega-3 fatty acid and essential brain nutrient, will help keep your child's brain functioning at its best.\*

BrainStrong™ Kids great tasting gummies contain *Life's DHA™*, the same brand of DHA found in infant formula. Since most kids don't eat the foods that naturally contain DHA, a supplement containing DHA is especially important to help promote optimal brain function.\*

<b>Supplement Facts</b>			
Serving Size: One (1) Gummy		Servings Per Container: 30	
	Amount Per Serving	% DV 3 years of age	% DV 4+ years of age
Calories	5		
Carbohydrates	1g	0%	0%
Sugars	1g		
Vitamin A (Palmitate)	2500 IU	100%	50%
Vitamin C (as Ascorbic Acid)	60 mg	150%	100%
Vitamin D <sub>3</sub> (as Cholecalciferol)	200 IU	50%	50%
Vitamin E (as d-tocopherol acetate)	10 IU	100%	33%
Riboflavin (Vitamin B <sub>2</sub> )	1.6 mg	200%	94%
Vitamin B <sub>6</sub> (Pyridoxine HCl)	1.5 mg	190%	75%
Pantothenic Acid (as d-panthoic)	5 mg	100%	50%
DHA (docosahexaenoic acid from algal oil)	100 mg	†	†

\*Percent Daily Values based on a 2,000 calorie diet. † Daily Value not established.

Other Ingredients: Glucose syrup, sugar, gelatin, dextrose, orange flavor, soy lecithin, lemon flavor, mixed carotenoids (containing glycerol, coconut oil, citric acid, malic acid, glycerol, spirulina, fractionated coconut oil, and/or palm kernel oil, coconut oil, and high oleic sunflower oil, and carmine wax), sunflower oil, anthocyanins, water.

**Directions:** For children 3+ years of age, chew one gummy daily. Not intended for children under 3 years of age due to risk of choking. THIS PRODUCT IS INTENDED FOR USE UNDER ADULT SUPERVISION ONLY. KEEP OUT OF REACH OF CHILDREN.

Distributed by AmeriLit, Inc. Cromwell, CT 06410. Made in the United Kingdom.

\*These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure or prevent any disease.

is from an all-natural, vegetarian source of DHA; not fish. You get the benefits of DHA without the worry of ocean-borne pollutants and toxins potentially found in certain fish. From start to finish, Life's DHA™ is produced in an FDA-inspected facility with controls in place to ensure the highest quality product.

Tamper evident: Do not use if blister foil or seal is open or damaged. Store at room temperature. Do not expose to excessive heat, humidity or direct sunlight.

For questions, comments, or to report an adverse event, please call (800) 722-3476, www.lifesdha.com

Life's DHA™ is a trademark of Merck BioSciences Corporation.

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Copies of all the BrainStrong product labels are attached hereto as Exhibit A.

### *The Impact of Defendant's Wrongful Conduct*

22. Despite inadequate and inapposite testing, Defendant continues to unequivocally claim that its Products support brain health and function for children and adults alike.

23. As the manufacturer and distributor of the BrainStrong products, Defendant possesses specialized knowledge regarding the content and effects of the ingredients contained in its Products and is in a superior position to learn of the effects - and has learned of the effects - its Products have on consumers.

24. Specifically, Defendant knew or should have known, but failed to disclose that its Products do not support brain health, that it has no competent and reliable scientific evidence that BrainStrong works as represented and that well conducted, clinical cause-and-effect studies have found no causative link between DHA algal oil supplementation and brain health.

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1           25. Nonetheless, Defendant conveyed and continues to convey one uniform  
2 message through its advertising campaign: BrainStrong supports brain health in children  
3 and adults.

4           26. Plaintiff and Class members have been and will continue to be deceived or  
5 misled by Defendant's deceptive brain health representations. Plaintiff purchased and  
6 consumed the Product during the relevant time period and in doing so, read and  
7 considered the Product labels and based her decision to buy the Product on the brain  
8 health representations. Defendant's brain health representations and omissions were a  
9 material factor in influencing Plaintiff's decision to purchase and give her daughter the  
10 Product. Plaintiff would not have purchased the Product had she known that Defendant's  
11 claims were false and misleading, that Defendant did not possess competent and reliable  
12 scientific evidence to support its brain health representations, and that clinical cause-and-  
13 effect studies have found no causative link between DHA algal oil supplementation and  
14 brain health.

15           27. As a result, Plaintiff and the Class members have been damaged in their  
16 purchases of these Products and have been deceived into purchasing Products that they  
17 believed, based on Defendant's representations, supported brain health, when, in fact, they  
18 do not.

19           28. Defendant, by contrast, reaped enormous profits from its false marketing  
20 and sale of these products.

#### 21                           **CLASS DEFINITION AND ALLEGATIONS**

22           29. Plaintiff brings this action on behalf of herself and all similarly situated  
23 consumers pursuant to C.C.P. §382 and Cal. Civ. Code §1781 and seeks certification of  
24 the following Class against I-Health for violations of California state laws and/or similar  
25 laws in other states:

**Multi-State Class Action**

All consumers who purchased BrainStrong Toddler, BrainStrong Kids and/or BrainStrong Adults.

Excluded from the Class are Defendant and its officers, directors and employees and those who purchased BrainStrong for the purpose of resale.

30. In the alternative, Plaintiff brings this brings this action on behalf of herself and all similarly situated California consumers pursuant to C.C.P. §382 and Cal. Civ. Code §1781 and seeks certification of the following Class:

**California-Only Class Action**

All California consumers who purchased BrainStrong Toddler, BrainStrong Kids and/or BrainStrong Adults.

Excluded from the Class are Defendant and its officers, directors and employees and those who purchased BrainStrong for the purpose of resale.

31. Plaintiff and the members of the Class are so numerous and geographically dispersed that joinder of all members individually is impracticable. While the exact number and identities of the Class members are unknown at this time, such information can be ascertained through appropriate investigation and discovery.

32. The disposition of Plaintiff's and proposed Class members' claims in a class action will provide substantial benefits to both the parties and the Court.

33. The proposed Class is ascertainable and there is a well-defined community of interest in the questions of law or fact alleged herein since the rights of each proposed Class member were infringed or violated in a similar fashion based upon Defendant's uniform warranties and misrepresentations and material omissions about its BrainStrong products.

1           34. The questions of law and fact common to the proposed Class predominate  
2 over questions that may affect particular proposed Class members. Common questions of  
3 fact and law include, but are not limited to, the following:

4                   (a) whether the claims discussed above are true, or are misleading, or  
5 reasonably likely to deceive;

6                   (b) whether Defendant's alleged conduct violates public policy;

7                   (c) whether the alleged conduct constitutes violations of the laws  
8 asserted;

9                   (d) whether Defendant engaged in false or misleading advertising;

10                  (e) whether Plaintiff and Class members have sustained monetary loss  
11 and the proper measure of that loss;

12                  (f) whether Plaintiff and Class members are entitled to restitution and  
13 disgorgement of damages; and

14                  (g) whether Plaintiff and Class members are entitled to declaratory and  
15 injunctive relief.

16           35. Judicial determination of the common legal and factual issues essential to  
17 this case would be far more efficient and economical as a class action than in piecemeal  
18 individual determinations.

19           36. Plaintiff's claims are typical of the claims of the members of the Class  
20 because, *inter alia*, all Class members were injured through the uniform misconduct  
21 described above, and were subject to Defendant's deceptive brain health representations,  
22 including the deceptive brain health representations that accompanied each and every box  
23 of BrainStrong. Plaintiff is advancing the same claims and legal theories on behalf of  
24 herself and all members of the Class.

25           37. Plaintiff is willing and prepared to serve the Court and the proposed Class in  
26 a representative capacity with all of the obligations and duties material thereto. Plaintiff  
27

1 will fairly and adequately protect the interests of the Class and has no interests adverse to  
2 or which directly and irrevocably conflict with the interests of other members of the Class.

3 38. The self interests of the Plaintiff are co-extensive with, and not antagonistic  
4 to, those of the absent Class members. Plaintiff will undertake to represent and protect the  
5 interests of the absent Class members.

6 39. Plaintiff has engaged the services of counsel indicated below. Counsel are  
7 experienced in complex class action litigation, will adequately prosecute this action, and  
8 will assert and protect the rights of, and otherwise will represent the plaintiff and absent  
9 Class members.

10 40. Plaintiff seeks preliminary and permanent injunctive and equitable relief on  
11 behalf of the entire Class, on grounds generally applicable to the entire Class, to enjoin  
12 and prevent Defendant from engaging in the acts described, and requiring Defendant to  
13 provide full restitution to Plaintiff and Class members.

14 41. Unless a Class is certified, Defendant will retain monies received as a result  
15 of its conduct that were taken from Plaintiff and Class members. Unless a Class-wide  
16 injunction is issued, Defendant will continue to commit the violations alleged, and the  
17 members of the Class and the general public will continue to be deceived.

18 42. Defendant has acted and refused to act on grounds generally applicable to  
19 the Class, making appropriate final injunctive relief with respect to the Class as a whole.

## 20 **COUNT I**

### 21 **Violation of Business & Professions Code §17200, et seq.**

22 43. Plaintiff repeats and re-alleges the allegations contained in the paragraphs  
23 above, as if fully set forth herein.

24 44. Plaintiff brings this claim individually and on behalf of the Class.

25 45. As alleged herein, Plaintiff has suffered injury in fact and lost money or  
26 property as a result of Defendant's conduct because she purchased the Product in reliance



1 on Defendant's brain health representations, but did not receive a product that supports  
2 brain health.

3 46. The Unfair Competition Law, Business & Professions Code §17200, *et seq.*  
4 ("UCL"), prohibits any "unlawful," "fraudulent" or "unfair" business act or practice and  
5 any false or misleading advertising. In the course of conducting business, Defendant  
6 committed unlawful business practices by, *inter alia*, making the representations (which  
7 also constitute advertising within the meaning of §17200) and omissions of material facts,  
8 as set forth more fully herein, and violating Civil Code §§1572, 1573, 1709, 1711, 1770  
9 and Business & Professions Code §§17200, *et seq.*, 17500, *et seq.*, and the common law.

10 47. Plaintiff and the Class reserve the right to allege other violations of law,  
11 which constitute other unlawful business acts or practices. Such conduct is ongoing and  
12 continues to this date.

13 48. Defendant's actions also constitute "unfair" business acts or practices  
14 because, as alleged above, *inter alia*, Defendant engaged in false advertising,  
15 misrepresented and omitted material facts regarding its BrainStrong products, and thereby  
16 offended an established public policy, and engaged in immoral, unethical, oppressive, and  
17 unscrupulous activities that are substantially injurious to consumers.

18 49. As stated in this Complaint, Plaintiff alleges violations of consumer  
19 protection, unfair competition and truth in advertising laws, resulting in harm to  
20 consumers. Defendant's acts and omissions also violate and offend the public policy  
21 against engaging in false and misleading advertising, unfair competition and deceptive  
22 conduct towards consumers. This conduct constitutes violations of the unfair prong of  
23 Business & Professions Code §17200, *et seq.*

24 50. There were reasonably available alternatives to further Defendant's  
25 legitimate business interests, other than the conduct described herein.

26 51. Business & Professions Code §17200, *et seq.*, also prohibits any "fraudulent

1 business act or practice.”

2 52. Defendant’s actions, claims, nondisclosures and misleading statements, as  
3 more fully set forth above, were also false, misleading and/or likely to deceive the  
4 consuming public within the meaning of Business & Professions Code §17200, *et seq.*

5 53. Plaintiff and the other Class members have suffered injury in fact and lost  
6 money as a result of these unlawful, unfair, and fraudulent practices.

7 54. As a result of its deception, Defendant has been able to reap unjust revenue  
8 and profit.

9 55. Unless restrained and enjoined, Defendant will continue to engage in the  
10 above-described conduct. Accordingly, injunctive relief is appropriate.

11 56. Plaintiff, on behalf of herself, all others similarly situated, and the general  
12 public, seeks restitution of all money obtained from Plaintiff and the members of the Class  
13 collected as a result of unfair competition, an injunction prohibiting Defendant from  
14 continuing such practices, corrective advertising and all other relief this Court deems  
15 appropriate, consistent with Business & Professions Code §17203.

16  
17 **COUNT II**  
18 **Violations of the Consumers Legal Remedies Act –**  
19 **Civil Code §1750 *et seq.***

20 57. Plaintiff repeats and re-alleges the allegations contained in the paragraphs  
21 above, as if fully set forth herein.

22 58. Plaintiff brings this claim individually and on behalf of the Class.

23 59. This cause of action is brought pursuant to the Consumers Legal Remedies  
24 Act, California Civil Code §1750, *et seq.* (the “Act”). Plaintiff is a consumer as defined  
25 by California Civil Code §1761(d). The BrainStrong products are “goods” within the  
26 meaning of the Act.

27 60. Defendant violated and continues to violate the Act by engaging in the  
28 following practices proscribed by California Civil Code §1770(a) in transactions with

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1 Plaintiff and the Class which were intended to result in, and did result in, the sale of the  
2 BrainStrong products:

3 (5) Representing that [the BrainStrong products have] . . . approval,  
4 characteristics, . . . uses [and] benefits . . . which [they do] not have . . .

5 \* \* \*

6 (7) Representing that [the BrainStrong products are] of a particular standard,  
7 quality or grade . . . if [they are] of another.

8 \* \* \*

9 (9) Advertising goods . . . with intent not to sell them as advertised.

10 \* \* \*

11 (16) Representing that [the BrainStrong products have] been supplied in  
12 accordance with a previous representation when [they have] not.

13 61. Defendant violated the Act by representing and failing to disclose material  
14 facts on the BrainStrong labels and associated advertising, as described above, when it  
15 knew, or should have known, that the representations were false and misleading and that  
16 the omissions were of material facts it was obligated to disclose.

17 62. Pursuant to California Civil Code §1782(d), Plaintiff and the Class seek a  
18 Court order enjoining the above-described wrongful acts and practices of Defendant and  
19 for restitution and disgorgement.

20 63. Pursuant to §1782 of the Act, by letter dated March 16, 2012, Plaintiff  
21 notified Defendant in writing by certified mail of the particular violations of §1770 of the  
22 Act and demanded that Defendant rectify the problems associated with the actions  
23 detailed above and give notice to all affected consumers of Defendant's intent to so act.

24 64. Defendant failed to rectify or agree to rectify the problems associated with  
25 the actions detailed above and give notice to all affected consumers within 30 days of the

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28 - 15 -

1 date of written notice pursuant to §1782 of the Act. Therefore, Plaintiff further seeks  
2 actual, punitive and statutory damages.

3 65. Defendant's conduct is fraudulent, wanton and malicious.

4  
5 **COUNT III**  
**Violation of State Consumer Protection Laws**

6 66. Plaintiff repeats and re-alleges the allegations contained in the paragraphs  
7 above, as if fully set forth herein.

8 67. In the alternative to Counts I and II above, Plaintiff and the Class allege that  
9 I-Health violated the substantive consumer protection and unfair trade practice acts or  
10 statutes of all states whose laws do not materially conflict with each other for purposes of  
11 this action.

12 68. By reason of the conduct alleged herein, by advertising and marketing  
13 BrainStrong in various media, including on the packaging and labeling, I-Health misled  
14 consumers about the brain health benefits of its Products. I-Health intentionally engaged  
15 in these deceptive acts and made false and misleading representations and omitted  
16 material facts.

17 69. While discovery may alter the following, Plaintiff preliminarily avers that  
18 Defendant violated the laws prohibiting unfair and deceptive trade practices of the states  
19 and territories wherein Class members reside, including: Alaska Stat. §45.50.471 et seq.;  
20 Ark. Code §4-88-101 et seq.; Cal. Bus. & Prof. Code §17200 et seq.; California Civil  
21 Code §1750 et seq.; Colo. Rev. Stat. § 6-1-101, et seq.; Conn. Gen. Stat. §42-110b et seq.;  
22 6 Del. Code §2511 et seq.; D.C. Code §28-3901 et seq.; Fla. Stat. §501.201 et seq.; Fla.  
23 Stat. §§817.06; Haw. Rev. Stat. §480 et seq.; Idaho Code §48-601 et seq.; 815 Ill. Comp.  
24 Stat. 502/1, et seq.; Iowa Code §714H et seq.; Kan. Stat. §50-623 et seq.; Ky. Rev. Stat.  
25 §367.110 et seq.; La. Rev. Stat. §51:1401 et seq.; Me. Rev. Stat. tit. 5 §205-A et seq.;  
26 Mass. Gen. Laws ch.93A et seq.; Md. Com. Law Code §13-101 et seq.; Mich. Stat.  
27 §445.901 et seq.; Minn. Stat. §8.31 et seq.; Miss. Code Ann. § 75-24-1 et seq.; Missouri



1 Stat. §407.010 et seq.; Mont. Code §30-14-101 et seq.; Neb. Rev. Stat §59-1601 et seq.;  
 2 Nev. Rev. Stat. §598.0903 et seq.; N.H. Rev. Stat. §358-A:1 et seq.; N.J. Rev. Stat. §56:8-  
 3 1 et seq.; N.M. Stat. §57-12-1 et seq.; N.Y. Gen. Bus. Law §349 et seq.; N.C. Gen. Stat.  
 4 §75-1.1 et seq.; N.D. Cent. Code §51-15-01 et seq.; Okla. Stat. 15 §751 et seq.; Or. Rev.  
 5 Stat. §646.605 et seq.; R.I. Gen. Laws. §6-13.1-1 et seq.; S.C. Code Laws §39-5-10 et  
 6 seq.; S.D. Code Laws §37-24-1 et seq.; Tenn. Code §47-18-101 et seq.; Tex. Bus. & Com.  
 7 Code §17.41 et seq.; Utah Code. §13-11-1 et seq.; 9 Vt. §2451 et seq.; Va. Code §59.1-  
 8 196 et seq.; Wash. Rev. Code. §19.86.010 et seq.; and West Virginia Code §46A-6-101 et  
 9 seq.

10 70. For example, the Washington Consumer Protection Act, Rev. Code §  
 11 19.86.020, declares that “[u]nfair methods of competition and unfair or deceptive acts or  
 12 practices in the conduct of any trade or commerce are declared unlawful.” Defendant’s  
 13 marketing, advertising, labeling, packaging and sale of BrainStrong is “commerce” as  
 14 defined by the Washington Consumer Protection Act. Rev. Code § 19.86.010(2).  
 15 Defendant violated the Washington Consumer Protection Act by representing through its  
 16 advertisements that BrainStrong supports brain health when such representations and  
 17 advertisements were false, and misleading. Defendant’s conduct, including  
 18 misrepresenting the efficacy of its Products in the course of commerce had the capacity to  
 19 and did inflict real injury and damage upon the Class. Rev. Code § 19.86.093. As a result  
 20 of Defendant’s unlawful conduct, the Class is entitled to judgment, full restitution and  
 21 damages, including treble damages. Rev. Code § 19.86.090. Plaintiff and Class members  
 22 are also entitled to costs, including attorneys’ fees. *Id.*

23 71. As a direct and proximate result of I-Health’s statutory violations, Plaintiff  
 24 and Class members have been injured and suffered damages, including all monies paid for  
 25 BrainStrong.

26 **COUNT IV**  
 27 **Breach of Express Warranty**

1           72. Plaintiff repeats and re-alleges the allegations contained in the paragraphs  
2 above, as if fully set forth herein.

3           73. Plaintiff brings this claim individually and on behalf of the Class.

4           74. The Uniform Commercial Code section 2-313 provides that an affirmation  
5 of fact or promise, including a description of the goods, becomes part of the basis of the  
6 bargain and creates an express warranty that the goods shall conform to the promise and  
7 to the description.

8           75. At all times, California and the following 13 states, including the District of  
9 Columbia, have codified and adopted the provisions the Uniform Commercial Code  
10 governing the express warranty of merchantability: Ala. Code 1975 §7-2-313; Alaska  
11 Stat. §45.02.313; Cal. Com. Code §2313; Colo. Rev. Stat. Ann. §4-2-313; Conn. Gen.  
12 Stat. §42a-313; D.C. Code §28:2-313; Haw. Rev. Stat. §490:2-313; Ind. Code. Ann. §26-  
13 1-2-313; Kans. Stat. Ann. §84-2-313; N.Y. U.C.C. Law §2-313; Ohio Rev. Code Ann.  
14 §1302.26; Wash. Rev. Code. Ann. §62A.2-313; and Wis. Stat. Ann. §402.313.

15           76. Defendant expressly warranted on each and every box of BrainStrong that  
16 the Products “support brain development and function” in children and adults alike. The  
17 brain health representations made by Defendant are affirmations of fact that became part  
18 of the basis of the bargain and created an express warranty that the goods would conform  
19 to the stated promise. Plaintiff placed importance on Defendant’s brain health  
20 representations.

21           77. All conditions precedent to Defendant’s liability under this contract have  
22 been performed by Plaintiff and the Class.

23           78. Defendant was provided notice of these issues by, *inter alia*, the instant  
24 Complaint and its predecessors.

6

8 Wherefore, Plaintiff prays for a judgment:

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Attorneys for Plaintiff

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**PROOF OF SERVICE**

I declare that:

I am and was at the time of service of the papers herein, over the age of eighteen (18) years and am not a party to the action. I am employed in the County of Maricopa, and my business address is 2901 N. Central Avenue, Suite 1000, Phoenix, Arizona 85012.

On May 30, 2012, I caused to be served the following documents:

**SECOND AMENDED CLASS ACTION COMPLAINT**

☐ **VIA FACSIMILE TRANSMISSION:** (Code Civ. Proc. §§ 1013(e) and (t)): From fax number (213) 406-1101 to the fax numbers listed below and/or on the attached service list. The facsimile machine I used complied with Rule 2008 and no error was reported by the machine.

☒ **VIA ELECTRONIC FILING:** Complying with Code of Civil Procedure section 1010.6 and pursuant to agreement by the parties, I caused such document(s) to be electronically served by e-mail to the parties listed on the Service List. The file transmission was reported as complete and a copy of the Service Receipt will be maintained with the original document(s) in our office.

☐ **VIA MAIL:** By placing a copy thereof for delivery in a separate envelope addressed to each addressee, respectively, as follows:

☐ **BY FIRST-CLASS MAIL** (Code of Civ. Proc. §§ 1013 and 1013(a))

☐ **BY OVERNIGHT DELIVERY** (Code Civ. Proc. §§ 1013(c) and (d))

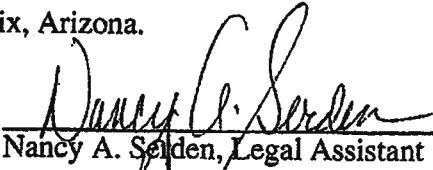
☐ **BY CERTIFIED RETURN RECEIPT MAIL** (Code of Civ. Proc. §§ 1013 and 1013(a))

**SEE ATTACHED SERVICE LIST**

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 30, 2012, at Phoenix, Arizona.

  
Nancy A. Selden, Legal Assistant

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SERVICE LIST

Jovel v. I-Health, Inc.  
Case No. BC481048

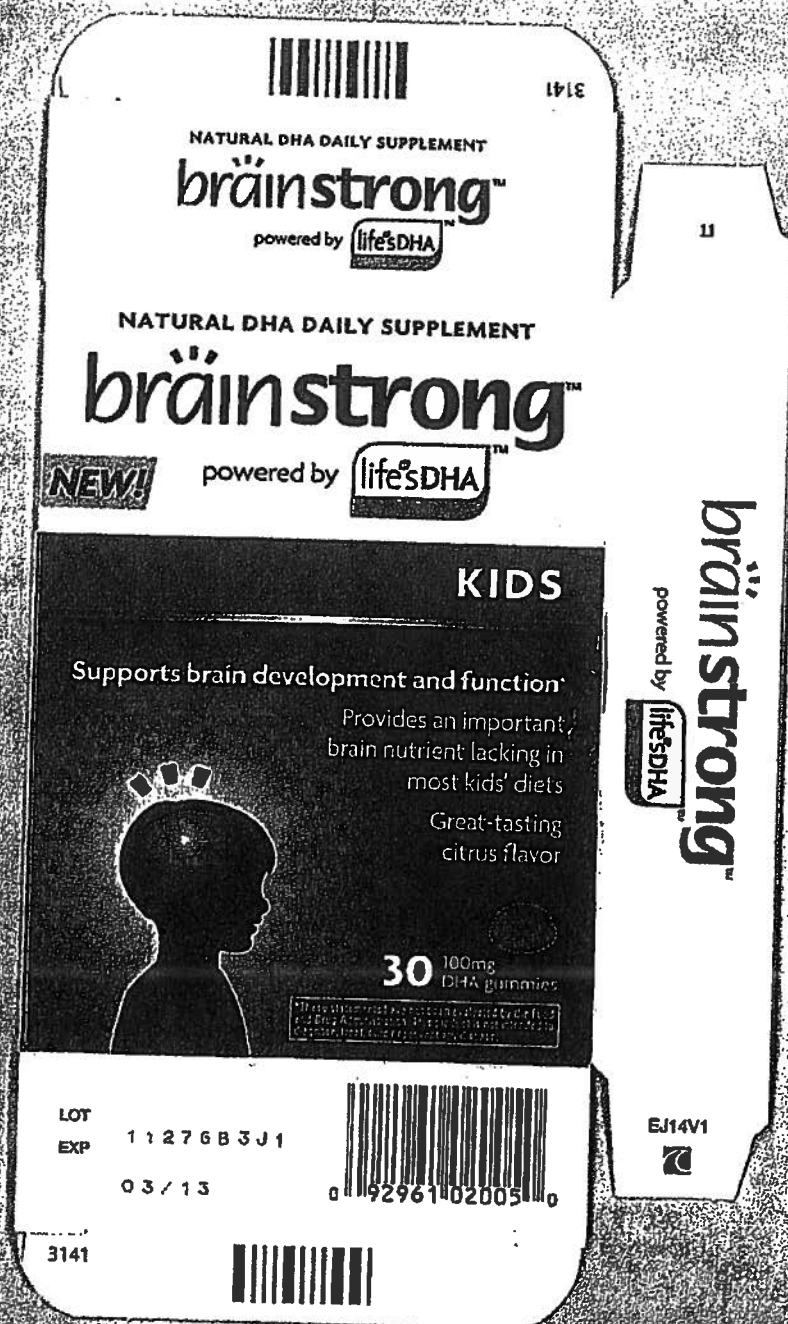
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Attorneys for Defendant  
I-HEALTH, INC.

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# Exhibit A

Exh. A  
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### Give your child a "vitamin" for their brain every day!

The school-age years bring a whole new set of challenges for young children. Ensuring that they get the proper amount of rest and eat a healthy diet is key. Supplementing their diet with DHA, an Omega-3 fatty acid and essential brain nutrient, will help keep your child's brain functioning at its best.\*

BrainStrong™ Kids great tasting gummies contain *life's DHA*™, the same brand of DHA found in infant formula. Since most kids don't eat the foods that naturally contain DHA, a supplement containing DHA is especially important to help promote optimal brain function.\*

#### Supplement Facts

Serving Size: One (1) Gummy

Servings Per Container: 30

	Amount Per Serving	% DV 3 years of age	% DV 4+ years of age
<b>Calories</b>	5		
<b>Carbohydrates</b>	1g	0%	0%
<b>Sugars</b>	1g		
<b>Vitamin A (Palmitate)</b>	2500 IU	100%	50%
<b>Vitamin C (as Ascorbic Acid)</b>	60 mg	150%	100%
<b>Vitamin D<sub>3</sub> (as Cholecalciferol)</b>	200 IU	50%	50%
<b>Vitamin E (as dl-tocopherol acetate)</b>	10 IU	100%	33%
<b>Riboflavin (Vitamin B<sub>2</sub>)</b>	1.5 mg	200%	94%
<b>Vitamin B<sub>6</sub> (Pyridoxine HCl)</b>	1.5 mg	100%	75%
<b>Pantothenic Acid (as d-panthanol)</b>	5 mg	100%	50%
<b>DHA (docosahexaenoic acid from algal oil)</b>	100 mg	†	†

\*Percent Daily Values are based on a diet of other people's secrets. †Daily Value not established.

Other ingredients: Glucose syrup, sugar, gelatin, dextrose, orange flavor, soy lecithin, lemon flavor, natural flavors (including glycerol, coconut oil, citric acid, malic acid, glazing agent (fractionated coconut oil and/or palm kernel oil, coconut oil, and high oleic sunflower oil, and carnauba wax), sunflower oil, anthocyanins, water.

**Directions:** For children 3+ years of age, chew one gummy daily. Not intended for children under 3 years of age due to risk of choking. THIS PRODUCT IS INTENDED FOR USE UNDER ADULT SUPERVISION ONLY. KEEP OUT OF REACH OF CHILDREN.

Distributed by Amarel, Inc. Cromwell, CT 06416. Made in the United Kingdom.

\*These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure or prevent any disease.

life's DHA™ is from an all-natural, vegetarian source of DHA; not fish. You get the benefits of DHA without the worry of ocean-borne pollutants and toxins potentially found in certain fish. From start to finish, life's DHA™ is produced in an FDA-inspected facility with controls in place to ensure the highest quality product.



Temperatures: Do not use if blister foil or seal is open or damaged. Store at room temperature. Do not expose to excessive heat, humidity or direct sunlight.

For questions, comments, or to report an adverse event, please call (800) 722-3476. www.lifesdha.com

life's DHA™ is a trademark of Amarel BioSciences Corporation.

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NATURAL DHA DAILY SUPPLEMENT

**brainstrong™**powered by **life'sDHA™****brainstrong™**powered by **life'sDHA™****Supplement Facts**Serving Size: One (1) Packet  
Servings Per Container: 30

	Amount Per Serving	% Daily Value*
Calories	10	
Calories from fat	5	
Total fat	0.5 g	1%**
Sodium	10 mg	0%
Total carbohydrate	1g	0%
DHA (docosahexaenoic acid from squal oil)	100 mg	†
Vitamin C	90 mg	150%

\*\*Percent Daily Values are based on a diet of other people's misdeeds.

† Daily Value not established.  
Other Ingredients: Gelatin, sugar, corn starch, arachidonic acid oil, sodium ascorbate, soy lecithin.  
Contains fish and soy.**Directions:** For children ages 1-3 years - One (1) packet of BrainStrong Toddler per day.As with any nutritional supplement, please inform your healthcare professional before use.  
Distributed by AmeriLit, Inc. 55 Seabreeze Drive, Cromwell, CT 06416  
© AmeriLit, Inc. 2010

For best results, mix one packet of BrainStrong Toddler into the following food:

4 oz. yogurt	1/3 cup mac-n-cheese
4 oz. pudding	1/4 cup mashed potatoes
1/2 cup oatmeal	1 cup 2% milk

For questions, concerns, or to report an adverse event, please call (800) 722-3476. [www.brainstrongdha.com](http://www.brainstrongdha.com)

NATURAL DHA DAILY SUPPLEMENT

**brainstrong™**powered by **life'sDHA™****NEW!****TODDLER**

Supports brain development and function\*

Contains the same brand of DHA found in infant formula

Flavorless, convenient to use

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brainstrong™  
powered by life'sDHA™

brainstrong™  
powered by life'sDHA™

Give your child a boost during this intense period of growth and development!

DHA is an Omega 3 fatty acid that is vital for brain and eye development not only during infancy but throughout your child's developmental years.\* Since your child is no longer breast or bottle-feeding, they may not be receiving the amount of DHA that he or she needs.

BrainStrong™ Toddler contains life'sDHA™, the same safe and natural DHA found in infant formula, to help meet your child's continuous need for DHA during this intense period of growth and development.\* Since most kids don't eat the foods that naturally contain DHA, a DHA supplement is especially important during this time. Flavorless and convenient to use, just sprinkle BrainStrong Toddler on your little one's favorite foods daily and give them an added boost they need.

life'sDHA™ is from an all-natural, vegetarian source of DHA; not fish. You get the benefits of DHA without the worry of ocean-borne pollutants and toxins potentially found in certain fish. From start to finish, life'sDHA™ is produced in an FDA-inspected facility with controls in place to ensure the highest quality product.

life'sDHA™ is a trademark of Martek Biosciences Corporation.

Keep out of reach of children.

Tamper evident: Powder sealed in packet. Do not use if packet is torn, open or damaged.

Store at room temperature. Do not expose to excessive heat, humidity or direct sunlight.

\*These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure or prevent any disease.

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**brainstrong**

powered by **lifesdha**

strengthen your brain and boost your  
short-term memory naturally

Brain health affects how you do at work, how you think, how you feel, how you learn, and how you live. Healthy brains are the key to a successful life. Brainstrong is the only DHA supplement that delivers the highest dose of DHA to the brain, 300mg, daily. Brainstrong is the only DHA supplement that is clinically proven to support short-term memory and cognitive function. Brainstrong is the only DHA supplement that is clinically proven to support short-term memory and cognitive function.

Brainstrong Adult is a natural, non-GMO, clinically proven DHA supplement that is clinically proven to support short-term memory and cognitive function. Brainstrong Adult is a natural, non-GMO, clinically proven DHA supplement that is clinically proven to support short-term memory and cognitive function.

Brainstrong Adult is a natural, non-GMO, clinically proven DHA supplement that is clinically proven to support short-term memory and cognitive function. Brainstrong Adult is a natural, non-GMO, clinically proven DHA supplement that is clinically proven to support short-term memory and cognitive function.

NATURAL DHA DAILY SUPPLEMENT

**brainstrong**

powered by **lifesdha**

NEW!

**ADULT**

Clinically shown to  
improve memory\*\*

Naturally supports mental clarity\*

Helps protect against  
normal cognitive decline

as we age\*

not actual size

300mg  
DHA softgels

\*Based on clinical studies showing that DHA supplementation improves memory and cognitive function in healthy adults. \*\*Based on clinical studies showing that DHA supplementation improves memory and cognitive function in healthy adults.





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7  
8 Attorneys for Defendant  
I-HEALTH, INC.

9  
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 COUNTY OF LOS ANGELES – CENTRAL DISTRICT

12 AMY JOVEL, On Behalf of Herself and  
13 All Others Similarly Situated,

14 Plaintiff,

15 v.

16 I-HEALTH, INC., a Delaware Corporation,

17 Defendant.

Case No. BC481048

**STIPULATION AND [PROPOSED] ORDER  
REGARDING BRIEFING SCHEDULE FOR  
MOTION TO STAY**

Dept.: 311

Judge: Hon. John Shepard Wiley

Trial Date: None Set

Action Filed: March 16, 2012

18  
19 WHEREAS, on May 25, 2012, at the initial status conference, the parties discussed  
20 Defendant's intention to file a motion to stay the case and set a briefing schedule for the same;

21 WHEREAS, the current briefing schedule for Defendant's motion to stay contemplates a  
22 motion due on June 20, 2012, an opposition to such motion due on July 5, 2012, and the reply  
23 brief in support of such motion due on July 12, 2012;

24 WHEREAS, the date of the hearing for Defendants' motion to stay is currently set for July  
25 24, 2012;

26 WHEREAS, pursuant to stipulation by the parties filed on May 31, 2012 and related  
27 Order of this Court, plaintiffs are permitted to file a Second Amended Complaint, which, among  
28

1 other things, purports to expand the putative class to a multi-state class;

2 WHEREAS, Defendants are evaluating whether to remove and whether facts support  
3 removal, and the deadline for Defendants to remove this action to federal court is June 30, 2012;  
4 and

5 WHEREAS, a motion to stay will not be necessary if Defendants choose to remove the  
6 case.

7 NOW THEREFORE, the parties jointly request that a revised briefing schedule for the  
8 motion to stay be set so that such motion will be due on July 13, 2012, the opposition to such  
9 motion will be due on July 30, 2012, and the reply in support of such motion will be due on  
10 August 6; and

11 THEREFORE, the parties jointly request that the Court vacate the hearing set for July 24,  
12 2012 and reserve a date in August 2012 for the hearing on the motion to stay.

13 IT IS SO STIPULATED.

14 Dated: June 7, 2012

HOGAN LOVELLS US LLP

15 By:   
16 Robert B. Hawk

17 Attorneys for Defendant  
18 I-HEALTH, INC.

19 Dated: June 7, 2012

BONNETT, FAIRBOURN, FRIEDMAN &  
BALINT, P.C.

20 and  
21 LEVIN, FISHBEIN, SEDRAN & BERMAN

22 By:   
23 Patricia N. Syverson

24 Attorneys for Plaintiff  
25 AMY JOVEL

26 IT IS SO ORDERED.

27 Dated: June \_\_, 2012

28 Judge, Superior Court of the State of California  
Ely. A County of Los Angeles  
742

- 2 -



PROOF OF SERVICE

I am a citizen of the United States and employed in San Francisco County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is Hogan Lovells US LLP, 4 Embarcadero Center, 22<sup>nd</sup> Floor, San Francisco, California 94111. On June 7, 2012, I served a copy of the within document(s):

## STIPULATION AND [PROPOSED] ORDER REGARDING BRIEFING SCHEDULE FOR MOTION TO STAY

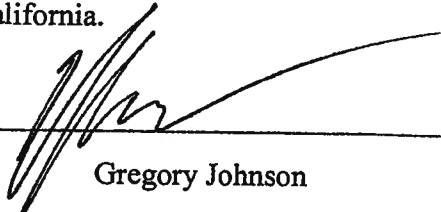
- ☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- ☐ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, the United States mail at San Francisco, California addressed as set forth below.
- ☐ by placing the document(s) listed above in a sealed FEDERAL EXPRESS envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a FEDERAL EXPRESS agent for delivery.
- ☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- ☒ by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

## SEE SERVICE LIST

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on June 7, 2012, at San Francisco, California.

  
\_\_\_\_\_  
Gregory Johnson

Ex. A  
PROOF OF SERVICE

SERVICE LIST

BONNETT, FAIRBOURN,  
FRIEDMAN & BALINT, P.C.  
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*Attorneys for Plaintiff*  
Amy Jovel

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- 2 -

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

**NOTICE OF ASSIGNMENT TO UNITED STATES MAGISTRATE JUDGE FOR DISCOVERY**

This case has been assigned to District Judge Dean D. Pregerson and the assigned discovery Magistrate Judge is Jay C. Gandhi.

The case number on all documents filed with the Court should read as follows:

**CV12- 5526 DDP (JCGx)**

Pursuant to General Order 05-07 of the United States District Court for the Central District of California, the Magistrate Judge has been designated to hear discovery related motions.

All discovery related motions should be noticed on the calendar of the Magistrate Judge

===== :  
**NOTICE TO COUNSEL**

*A copy of this notice must be served with the summons and complaint on all defendants (if a removal action is filed, a copy of this notice must be served on all plaintiffs).*

Subsequent documents must be filed at the following location:

☒ **Western Division**  
312 N. Spring St., Rm. G-8  
Los Angeles, CA 90012

☐ **Southern Division**  
411 West Fourth St., Rm. 1-053  
Santa Ana, CA 92701-4516

☐ **Eastern Division**  
3470 Twelfth St., Rm. 134  
Riverside, CA 92501

Failure to file at the proper location will result in your documents being returned to you.

COPY

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA  
CIVIL COVER SHEET

<b>I (a) PLAINTIFFS</b> (Check box if you are representing yourself <input type="checkbox"/> )  AMY JOVEL, on behalf of herself and all others similarly situated	<b>DEFENDANTS</b>  I-HEALTH, INC., a Delaware Corporation
<b>(b) Attorneys</b> (Firm Name, Address and Telephone Number. If you are representing yourself, provide same.) Stewart Weltman, LEVIN, FISHBEIN, SEDRAN & BERMAN 122 S. Michigan Avenue, Suite 1850, Chicago, IL 60603 Phone: (312) 427-3600	<b>Attorneys (If Known)</b> Robert B. Hawk, HOGAN LOVELLS US LLP 525 University Avenue, 4th Floor, Palo Alto, CA 94301 Phone: (650) 463-4000

<b>II. BASIS OF JURISDICTION</b> (Place an X in one box only.)  <input type="checkbox"/> 1 U.S. Government Plaintiff <input type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)  <input type="checkbox"/> 2 U.S. Government Defendant <input checked="" type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)	<b>III. CITIZENSHIP OF PRINCIPAL PARTIES - For Diversity Cases Only</b> (Place an X in one box for plaintiff and one for defendant.) <table style="width:100%; border: none;"> <tr> <td style="width:40%;"></td> <td style="width:10%; text-align: center;"><b>PTF</b></td> <td style="width:10%; text-align: center;"><b>DEF</b></td> <td style="width:30%;"></td> <td style="width:10%; text-align: center;"><b>PTF</b></td> <td style="width:10%; text-align: center;"><b>DEF</b></td> </tr> <tr> <td>Citizen of This State</td> <td style="text-align: center;"><input checked="" type="checkbox"/> 1</td> <td style="text-align: center;"><input type="checkbox"/> 1</td> <td>Incorporated or Principal Place of Business in this State</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td>Incorporated and Principal Place of Business in Another State</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> <td style="text-align: center;"><input checked="" type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> </tr> </table>		<b>PTF</b>	<b>DEF</b>		<b>PTF</b>	<b>DEF</b>	Citizen of This State	<input checked="" type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business in this State	<input type="checkbox"/> 4	<input type="checkbox"/> 4	Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business in Another State	<input type="checkbox"/> 5	<input checked="" type="checkbox"/> 5	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6
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Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6																				

  
**IV. ORIGIN** (Place an X in one box only.)  
☐ 1 Original Proceeding     ☒ 2 Removed from State Court     ☐ 3 Remanded from Appellate Court     ☐ 4 Reinstated or Reopened     ☐ 5 Transferred from another district (specify):     ☐ 6 Multi-District Litigation     ☐ 7 Appeal to District Judge from Magistrate Judge
   
  
**V. REQUESTED IN COMPLAINT:** JURY DEMAND: ☒ Yes     ☐ No (Check 'Yes' only if demanded in complaint.)  
**CLASS ACTION** under F.R.C.P. 23: ☒ Yes     ☐ No     **MONEY DEMANDED IN COMPLAINT:** \$ \_\_\_\_\_
   
  
**VI. CAUSE OF ACTION** (Cite the U.S. Civil Statute under which you are filing and write a brief statement of cause. Do not cite jurisdictional statutes unless diversity.)  
 28 U.S.C. § 1332 - Diversity; 28 U.S.C. §§ 1441, 1446, & 1453 - Removal
   
  
**VII. NATURE OF SUIT** (Place an X in one box only.)
 

<b>OTHER STATUTES</b> <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Act <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Info. Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes	<b>CONTRACT</b> <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loan (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise <b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>TORTS</b> <b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Fed. Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury-Med Malpractice <input type="checkbox"/> 365 Personal Injury-Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>IMMIGRATION</b> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus-Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<b>TORTS</b> <b>PERSONAL PROPERTY</b> <input checked="" type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability <b>BANKRUPTCY</b> <input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>CIVIL RIGHTS</b> <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 American with Disabilities - Employment <input type="checkbox"/> 446 American with Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	<b>PRISONER PETITIONS</b> <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General Habeas Corpus <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus/Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <b>FORFEITURE/PENALTY</b> <input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS-Third Party 26 USC 7609
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CV12-5526

FOR OFFICE USE ONLY: Case Number: \_\_\_\_\_

AFTER COMPLETING THE FRONT SIDE OF FORM CV-71, COMPLETE THE INFORMATION REQUESTED BELOW.



**UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA**  
**CIVIL COVER SHEET**

**VIII(a). IDENTICAL CASES:** Has this action been previously filed in this court and dismissed, remanded or closed? ☒ No ☐ Yes  
 If yes, list case number(s): \_\_\_\_\_

**VIII(b). RELATED CASES:** Have any cases been previously filed in this court that are related to the present case? ☒ No ☐ Yes  
 If yes, list case number(s): \_\_\_\_\_

**Civil cases are deemed related if a previously filed case and the present case:**

- (Check all boxes that apply) ☐ A. Arise from the same or closely related transactions, happenings, or events; or  
☐ B. Call for determination of the same or substantially related or similar questions of law and fact; or  
☐ C. For other reasons would entail substantial duplication of labor if heard by different judges; or  
☐ D. Involve the same patent, trademark or copyright, and one of the factors identified above in a, b or c also is present.

**IX. VENUE:** (When completing the following information, use an additional sheet if necessary.)

- (a) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which **EACH** named plaintiff resides.  
☐ Check here if the government, its agencies or employees is a named plaintiff. If this box is checked, go to item (b).

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
Los Angeles County	

- (b) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which **EACH** named defendant resides.  
☐ Check here if the government, its agencies or employees is a named defendant. If this box is checked, go to item (c).

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
	Connecticut; Delaware

- (c) List the County in this District; California County outside of this District; State if other than California; or Foreign Country, in which **EACH** claim arose.  
**Note: In land condemnation cases, use the location of the tract of land involved.**

County in this District:*	California County outside of this District; State, if other than California; or Foreign Country
Los Angeles County	

\* Los Angeles, Orange, San Bernardino, Riverside, Ventura, Santa Barbara, or San Luis Obispo Counties

**Note:** In land condemnation cases, use the location of the tract of land involved

**X. SIGNATURE OF ATTORNEY (OR PRO PER):**

*Robert H. Hunt*

Date

*June 22, 2012*

**Notice to Counsel/Parties:** The CV-71 (JS-44) Civil Cover Sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law. This form, approved by the Judicial Conference of the United States in September 1974, is required pursuant to Local Rule 3-1 is not filed but is used by the Clerk of the Court for the purpose of statistics, venue and initiating the civil docket sheet. (For more detailed instructions, see separate instructions sheet.)

**Key to Statistical codes relating to Social Security Cases:**

Nature of Suit Code	Abbreviation	Substantive Statement of Cause of Action
861	HIA	All claims for health insurance benefits (Medicare) under Title 18, Part A, of the Social Security Act, as amended. Also, include claims by hospitals, skilled nursing facilities, etc., for certification as providers of services under the program. (42 U.S.C. 1935FF(b))
862	BL	All claims for "Black Lung" benefits under Title 4, Part B, of the Federal Coal Mine Health and Safety Act of 1969. (30 U.S.C. 923)
863	DIWC	All claims filed by insured workers for disability insurance benefits under Title 2 of the Social Security Act, as amended; plus all claims filed for child's insurance benefits based on disability. (42 U.S.C. 405(g))
863	DIWW	All claims filed for widows or widowers insurance benefits based on disability under Title 2 of the Social Security Act, as amended. (42 U.S.C. 405(g))
864	SSID	All claims for supplemental security income payments based upon disability filed under Title 16 of the Social Security Act, as amended.
865	RSI	All claims for retirement (old age) and survivors benefits under Title 2 of the Social Security Act, as amended. (42 U.S.C. (g))